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No. 08-____

IN THE

Supreme Court of the United States

CHRISTOPHER PAVEY,
Petitioner,

v.

PATRICK CONLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID M. FRIEBUS
BABBITT, LAND, SILVERSTEIN & WARNER LLP
332 South Michigan Ave.
Suite 710
Chicago, Illinois 60604
(312) 427-5555

JONATHAN D. HACKER
(*Counsel of Record*)
JUSTIN FLORENCE*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted only in Massachusetts*

WALTER DELLINGER**
HARVARD LAW SCHOOL SUPREME COURT AND APPELLATE PRACTICE CLINIC
***May be contacted at O'Melveny & Myers LLP*

Attorneys for Petitioner

QUESTION PRESENTED

In *Jones v. Bock*, 549 U.S. 199 (2007), this Court held that exhaustion of prison administrative remedies under the Prison Litigation Reform Act ("PLRA") is an affirmative defense, which must be pleaded and proved by the defendant in accordance with the usual practice under the Federal Rules of Civil Procedure. In the decision below, the Seventh Circuit nevertheless held that PLRA exhaustion is an "issue of judicial traffic control" to be litigated not under the normal procedural rules, but instead in accordance with a special preliminary procedure by which a court resolves the affirmative defense—including any underlying factual disputes about its application—before discovery or any other litigation on the merits of a claim may proceed.

The following question is presented:

When the defendant in an action for damages governed by the PLRA invokes the statutory affirmative defense of exhaustion, is the defense to be litigated under the usual rules of procedure applicable to affirmative defenses, including trial by jury to resolve disputed factual issues underlying the defense?

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states as follows:

Petitioner Christopher Pavey was plaintiff in the district court and appellee in the court of appeals.

Respondents Patrick Conley, Robert Watts, Laurence Grott, and Javadis Beaty were defendants in the trial court and appellants in the court of appeals. A fifth defendant in the trial court, Casiano (first name unknown), was not served with process and a sixth, Shepard (first name unknown), has not appeared in this action.

TABLE OF CONTENTS

Page

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

A. Factual Background 3

B. Proceedings Below 4

REASONS FOR GRANTING THE WRIT 10

I. THE DECISION BELOW CONFLICTS WITH MULTIPLE PRECEDENTS GOVERNING THE ADJUDICATION OF AFFIRMATIVE DEFENSES 12

A. Exhaustion Of Prison Remedies Under The PLRA Is A Substantive Legal Defense Subject To Normal Pleading And Proof Procedures 12

B. Numerous Precedents Hold That Factually Disputed Affirmative Defenses Must Be Resolved By The Jury, Not The Court, Contrary To the Decision Below 16

II. THE LOWER FEDERAL COURTS ARE IN DISARRAY OVER THE PROPER PROCEDURES FOR ADUJUDICATING THE PLRA EXHAUSTION DEFENSE.....26

III. THE PROPER ADJUDICATION OF THE PLRA EXHAUSTION DEFENSE IS AN IMPORTANT AND RECURRING ISSUE.....32

CONCLUSION.....36

APPENDIX A:

Court of Appeals Opinion dated September 12, 2008 .....1a

APPENDIX B:

District Court Opinion and Order dated Dec. 14, 2006 .....8a

APPENDIX C:

District Court Opinion and Order dated Nov. 21, 2006 .....13a

APPENDIX D:

District Court Order dated Nov. 16, 2006 .....18a

APPENDIX E:

District Court Order dated Nov. 16, 2006 .....21a

APPENDIX F:

Court of Appeals Order dated March 3, 2006 .....24a

APPENDIX G:

Order Denying Rehearing
dated Sept. 12, 2008 ..... 36a

TABLE OF AUTHORITIES

Page(s)

CASES

Amador v. Superintendents of Dep't. of Correctional Svcs., 2007 WL 4326747 (S.D.N.Y. Dec. 4, 2007) ...27, 32
American Dredging Co. v. Miller, 510 U.S. 443 (1994).....20
Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).....20
Baines v. Maddock, 2007 WL 173948 (S.D. Cal. Jan. 3, 2007).....29
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).....23
Bertha Building Corp. v. Nat'l Theatres Corp., 248 F.2d 833 (2d Cir. 1957).....18
Booth v. Churner, 532 U.S. 731 (2001).....10
Borg v. L & J Energy, Inc., 1990 WL 122225 (W.D. Mich. May 25, 1990).....23
Brownell v. Krom, 446 F.3d 305 (2d Cir. 2006).....26
Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008).....22, 27, 29, 30
Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).....16
Casanova v. Dubois, 304 F.3d 75 (1st Cir. 2002).....18, 31
Chambliss v. Simmons, 165 F. 419 (5th Cir. 1908).....18

Chocallo v. IRS,
2007 WL 2071880 (E.D. Pa. July 17, 2007) 17
City of Monterey v. Del Monte Dunes, Ltd.,
526 U.S. 687 (1999) 7, 16
Curtis v. Loether,
415 U.S. 189 (1974) 22
Dairy Queen, Inc. v. Wood,
369 U.S. 469 (1962) 22
Dale v. Poston,
548 F.3d 563 (7th Cir. 2008) 26
DDB Techs., L.L.C. v. MLB Advanced Media, L.P., 517 F.3d 1284 (Fed. Cir. 2008) 22
Denton v. Hernandez,
504 U.S. 25 (1992) 14
Europlast, Ltd. v. Oak Switch Sys.,
10 F.3d 1266 (7th Cir. 1993) 17
Fields v. Okla. State Penitentiary,
511 F.3d 1109 (10th Cir. 2007) 26
Finch v. Servello,
2008 WL 4527758 (N.D.N.Y. Sept. 29, 2008) 32
Foulk v. Charrier,
262 F.3d 687 (8th Cir. 2001) 26
Fowler v. Land Mgmt. Groupe, Inc.,
978 F.2d 158 (4th Cir. 1992) 18
Gilmore v. Stalder,
2008 WL 4155332 (W.D. La. Sept. 8, 2008) 32
Granite State Ins. Co. v. Smart Modular Techs., Inc., 76 F.3d 1023 (9th Cir. 1996) 17
Hinojosa v. Johnson,
277 F. App'x 370 (5th Cir. 2008) 26

Intrastate Gas Gathering Co. v. Dow Chemical Co., 248 F.3d 1140 (5th Cir. 2001) 17
Jazzabi v. Allstate Ins. Co., 278 F.3d 979 (9th Cir. 2002) 16
Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004) 18
Jones v. Bock 549 U.S. 199 (2007) ..... passim
Kaba v. Stepp, 458 F.3d 678 (7th Cir. 2006) 26
Kaplan v. Exxon Corp., 126 F.3d 221 (3d Cir. 1997) 17
Kierulff Assocs. v. Luria Bros. & Co., 240 F. Supp. 640 (S.D.N.Y. 1965) 23
Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235 (1922) 17
Lunney v. Brureton, 2007 WL 1544629 (S.D.N.Y. May 29, 2007) 27, 29
Maraglia v. Maloney, 499 F. Supp. 2d 93 (D. Mass. 2007) 27
Meléndez-Arroyo v. Cutler-Hammer de P.R. Co., 273 F.3d 30 (1st Cir. 2001) 18
Nike, Inc. v. "Just Did It" Enterprises, 6 F.3d 1225 (7th Cir. 1993) 17
Owens v. Blagojevich, 2008 WL 4792707 (S.D. Ill. Oct. 29, 2008) 19
Percival v. Knowles, 2007 WL 2827789 (E.D. Cal. Sept. 27, 2007) 28
Perez v. Wisconsin Dep't of Corr., 182 F.3d 532 (7th Cir. 1999) 18

Porter v. Nussle,
534 U.S. 516 (2002) 10
Pruitt v. Mote,
503 F.3d 647 (7th Cir. 2007) 34, 35
Ray v. Kertes,
285 F.3d 287 (3d Cir. 2002) 18
Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365 (9th Cir. 1988) 27, 28
Robinson v. Metro-North Commuter R.R.,
267 F.3d 147 (2d Cir. 2001) 16
Rosales v. United States,
824 F.2d 799 (9th Cir. 1987) 23
Schramm v. Oakes,
352 F.2d 143 (10th Cir. 1965) 23
Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio, 261 F.3d 542 (5th Cir. 2001) 17
Singleton v. Johnson,
2008 WL 3887633 (S.D. Ga. Aug. 18, 2008) 31
Stauffer Chem. Co. v. FDA,
670 F.2d 106 (9th Cir. 1982) 28
Studio Elec. Technicians Local 728 v. Int'l Photographers of Motion Picture Indus. Local 659, 598 F.2d 551 (9th Cir. 1979) 28
Torres-Negron v. J & N Records, LLC,
504 F.3d 151 (1st Cir. 2007) 23
Tri County Indus., Inc. v. District of Columbia,
200 F.3d 836 (D.C. Cir. 2000) 17
United States v. Duncan,
850 F.2d 1104 (6th Cir. 1988) 17
United States v. Edwards,
968 F.2d 1148 (11th Cir. 1992) 18

Vibber v. U.S. Rubber Co.,
255 F. Supp. 47 (S.D.N.Y. 1966) 23
Waco Int'l, Inc. v. KHK Scaffolding Houston, Inc., 278 F.3d 523 (5th Cir. 2002) 17
Williams v. Beard,
482 F.3d 637 (3d Cir. 2007) 26
Woodford v. Ngo,
548 U.S. 81 (2006) .....passim
Wyatt v. Terhune,
315 F.3d 1108 (9th Cir. 2003) 27, 28

STATUTES

28 U.S.C. § 1915A 4, 13
42 U.S.C. § 1997e 2, 5, 10, 13, 34
Fed. R. Civ. P. 12 21
Fed. R. Civ. P. 56 21

OTHER AUTHORITIES

3 James Wm. Moore et al., Moore's Federal Practice § 22.01(5)(d) 23
5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1277 (3d ed. 1998) 21
5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1373 (3d ed. 1998) 21
9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2304 (3d ed. 1998) 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Pavey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a) is published at 544 F.3d 739 (7th Cir. 2008). The Order denying rehearing and rehearing en banc (App. 36a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2008. The court of appeals denied rehearing and rehearing en banc on September 12, 2008. App. 36a. Justice Stevens granted petitioner's application for an extension of time until January 12, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the U.S. Constitution provides:

> In Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Title 42, § 1997e of the U.S. Code states in pertinent part:

> **§ 1997e. Suits by prisoners**
>
> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

STATEMENT OF THE CASE

As the district court correctly recognized, this case presents a recurring question with a "far-reaching impact on prisoner litigation" (App. 10a): Is the statutory affirmative defense of exhaustion in the Prison Litigation Reform Act ("PLRA") to be litigated like any other legal affirmative defense, under normal rules of procedure and with disputed facts to be resolved by a jury at trial? The district court answered that question in the affirmative, but the Seventh Circuit reversed. It held that exhaustion is a quasi-jurisdictional "issue of judicial traffic control," such that judges must resolve the affirmative defense—including any factual disputes about its application—in a preliminary fashion before the parties may proceed with discovery and litigation on the merits of a claim. App. 4a. To resolve exhaustion on this threshold basis, the court of appeals mandated an elaborate special procedure distinct from the usual Federal Rules governing federal-court litigation.

The court of appeals' conclusion cannot be reconciled with this Court's recent decision in *Jones v. Bock*, 549 U.S. 199 (2007), which holds that exhaustion in the PLRA is an affirmative defense to be governed by the usual practice under the Federal Rules of Civil Procedure. The decision also conflicts with multiple decisions of this Court and others concerning the adjudication of affirmative defenses in federal-court actions at law.

While exacerbating conflicts that are already wide and spreading, the error in the Seventh Circuit's decision is nevertheless so clear, and the resolution so simple, that a summary reversal may be in order in lieu of plenary review. This Court could summarily pronounce that, rather than the complicated procedure adopted by the decision below, the PLRA exhaustion defense is to be tried like any other legal defense, in accordance with normal rules of procedure, and ultimately subject to a jury trial when necessary to resolve disputed factual issues bearing on exhaustion. If the case warrants consideration beyond that simple resolution, certiorari should be granted and the case set for full briefing and argument.

A. Factual Background

Petitioner Christopher Pavey is an Indiana state prisoner. On October 14, 2001, prison guards at the Maximum Control Facility in Westville, Indiana ("MCF"), broke his arm during a cell extraction. Petitioner was isolated in his cell following the extraction; it was not until the next day that prison staff responded to his repeated requests to speak about the incident to a prison official, who told petitioner

that he "would check into it." App. 25a. Later that day, petitioner was taken to another prison where he received medical treatment. When petitioner returned to MCF, two prison officials interviewed him about the events of the previous day and photographed his arm. Petitioner was then returned to his cell and isolated. Four days later, petitioner was transferred to a hospital in Indianapolis, where a doctor surgically repaired his broken arm with a metal plate and screws. A week after the surgery, petitioner was transferred to Pendleton Correctional Facility.

During this period, petitioner could not write because of his broken arm, but he grieved to "anyone who would listen" about his treatment by respondents. App. 29a. In January 2002, as soon as his arm healed and he was able to write, petitioner filed a written grievance about the cell extraction. *Id.* The grievance was rejected on the stated ground that it should have been filed at MCF, within 48 hours after the incident.

B. Proceedings Below

1. Petitioner, proceeding *pro se*, brought this suit against respondents—the prison guards who broke his arm—seeking damages under 42 U.S.C. § 1983. After the initial screening required by the PLRA, *see* 28 U.S.C. § 1915A(a), (b), the district court allowed petitioner to proceed on a claim that respondents used excessive force during the cell extraction. Respondents answered the complaint and admitted that a forceful extraction took place, but they asserted the affirmative defense that petitioner failed to exhaust his available administrative remedies be-

fore filing suit as required by the PLRA, 42 U.S.C. § 1997e(a). Respondents moved for summary judgment on their affirmative defense, asserting that because there was no grievance on file at MCF, petitioner must not have exhausted his administrative remedies. The district court agreed and granted summary judgment.

2. The court of appeals reversed. It held that the record reflected genuine disputes of material fact over whether petitioner exhausted his administrative remedies in accordance with prison procedures. App. 23a-24a. Summary judgment was improper for three reasons, the court explained.

First, the prison's grievance procedures "specifically allow[ed] inmates who cannot write to get . . . a staff member to assist them in preparing grievances." App. 30a. It was "undisputed" that petitioner could not physically write during the 48-hour grievance period because of his broken arm and because he was locked in his cell. App. 31a. Thus, "[i]f there was to be a written grievance, then it had to be written for Mr. Pavey by the officers who interviewed him." *Id.* Under the prison's procedures, "[he] did not have to write it himself; he did not have to review it; and he did not have to sign it." *Id.* Accordingly, so long as the officers who interviewed him "memorialized" his "oral account of the cell extraction," then petitioner may well have "literally satisf[ied]" the required procedure. *Id.* And because respondents failed to show that his complaints were never reduced to writing, summary judgment was premature. *Id.*

Second, there was a factual dispute as to whether petitioner "reasonably believed that he had done all that was necessary to comply" with the grievance procedure. "[I]nmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies," the court held, and there was a genuine factual dispute over whether petitioner had reasonably relied on assurances "that his excessive-force allegations would be investigated." App. 34a.

Finally, the court of appeals held that a factual dispute existed concerning the availability of the grievance procedure. "[W]hen inmates cannot comply with [a] grievance procedure without essential help from prison officials and that assistance is withheld, the failure of the officials to facilitate the grievance process effectively renders administrative remedies unavailable." App. 34a. Because petitioner was injured and isolated during the grievance period, the affirmative defense of failure to exhaust would be irrelevant if the record showed that respondents gave him "no assistance in creating what would otherwise qualify as a written grievance." *Id.* And respondents failed to establish the lack of any genuine factual question as to their efforts to facilitate petitioner's compliance with the grievance procedure. *Id.*

For the foregoing reasons, the court concluded, respondents "did not establish the absence of material issues of fact concerning the exhaustion question." App. 35a. Accordingly, the court of appeals vacated the summary judgment and remanded the

case "for further proceedings on Mr. Pavey's excessive-force claim." *Id.*

3. Upon remand to the district court, petitioner sought and was granted a jury trial on his damages claims under 42 U.S.C. § 1983. *See City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999) (recognizing right to jury trial on damages claims under § 1983). Respondents argued, however, that before proceeding with discovery on the merits, the court should hold a hearing to resolve for itself the disputed factual questions concerning respondents' exhaustion affirmative defense. The district court declined to do so. The court acknowledged that respondents "retain[ed] their exhaustion affirmative defense (along with any other affirmative defenses that were properly raised)," but observed that "the place for presenting those defenses is to the jury, and the time for doing so is after the plaintiff has rested his case in chief." App. 20a.

Respondents sought reconsideration of the ruling, arguing that the exhaustion affirmative defense was properly tried to the court rather than the jury, and that resolution of the exhaustion issue should precede discovery and trial of the merits. The district court denied respondents' motion. The "presumption is that fact questions are resolved by juries," the court held, and nothing in the PLRA deprives a plaintiff in a § 1983 damages action of his right to a jury trial on the exhaustion affirmative defense. App. 14a. And the court reiterated that the "time for presenting affirmative defenses to the jury is no different in this case than it is in any other: after the plaintiff has rested his case in chief." App. 16a.

Respondents then moved the district court to certify this series of orders for interlocutory appeal under 28 U.S.C. § 1292(b). The district court noted that the Indiana Attorney General, counsel for respondents, had made the same arguments regarding exhaustion "unsuccessfully in several cases" but agreed to certify its orders for interlocutory appeal because of "the far-reaching impact on prisoner litigation that these new interpretations would impose." App. 10a.

4. The court of appeals reversed. It held that whenever exhaustion is contested, a judge must resolve genuine disputed facts about the affirmative defense in a preliminary hearing before litigation may proceed. The court of appeals explained that "[j]uries decide cases, not issues of judicial traffic control," and that "[u]ntil the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to." App. 4a. Thus, the court of appeals concluded, just as juries do not decide factual disputes relevant to jurisdiction, they also do not decide factual disputes about the PLRA's exhaustion provision. And unless resolution of exhaustion precedes all discovery and litigation of the merits, "the statutory goal of sparing federal courts the burden of prisoner litigation until and unless the prisoner has exhausted his administrative remedies will not be achieved." App. 7a. But because the "traffic control" theory of exhaustion is not reflected in any specific rule of federal procedure, the court of appeals articulated a novel, three-step "sequence" for resolving an exhaustion defense in a preliminary proceeding by the court before any litigation on the merits may proceed:

> (1) The district judge conducts a hearing on exhaustion and permits whatever discovery relating to exhaustion he deems appropriate. (2) If the judge determines that the prisoner did not exhaust his administrative remedies, the judge will then determine whether (a) the plaintiff has failed to exhaust his administrative remedies, and so he must go back and exhaust; (b) or, although he has no unexhausted administrative remedies, the failure to exhaust was innocent . . . and so he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround); or (c) the failure to exhaust was the prisoner's fault, in which event the case is over. (3) If and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.

App. 6a. The court of appeals acknowledged that in cases, like petitioner's, where the affirmative defense shares disputed facts with the underlying substantive claim, a preliminary determination of exhaustion by the court might interfere with the jury's fact-finding role. But it answered this concern by holding that whatever factual findings the judge makes

about exhaustion (so long as the judge finds exhaustion), the jury will simply "reexamine[]" at trial any relevant findings on the merits "without being bound by (or even informed of) any of the findings made by the district judge." App. 5a-6a.

5. Petitioner filed a timely petition for rehearing with suggestion of rehearing en banc. The court of appeals denied the petition but amended a portion of its opinion to permit limited discovery of factual issues related to both exhaustion and the merits. App. 6a. Upon remand, the district court referred the case to a magistrate judge for an evidentiary hearing on respondents' affirmative defense but stayed the proceedings pending review by this Court. This petition followed.

REASONS FOR GRANTING THE WRIT

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This provision has been a frequent subject of litigation since its enactment, and this Court has granted certiorari on numerous occasions to resolve controversies—and provide guidance to lower courts—concerning its interpretation and application. *See Booth v. Churner*, 532 U.S. 731 (2001) (granting review to address whether exhaustion is mandatory regardless of the relief sought); *Porter v. Nussle*, 534 U.S. 516 (2002) (granting review to address whether exhaustion is required of all causes of action); *Woodford v. Ngo*, 548 U.S. 81 (2006) (granting review to address

whether the PLRA requires "proper" exhaustion); *Jones v. Bock*, 549 U.S. 199 (2007) (granting review and reversing several judicially-imposed rules "designed to implement [the] exhaustion requirement and facilitate early judicial screening" of prisoner complaints).

This case presents yet another important question concerning the PLRA's exhaustion requirement meriting review by this Court. As elaborated below, there is substantial disarray in the lower courts over the question whether the exhaustion requirement—which is a mandatory element, albeit one on which the defendant bears the burden of pleading and proof—must be adjudicated by a jury in a damages action, or whether the court can decide the issue for itself in a preliminary "screening" proceeding. Although the disarray is already broad and continually deepening, the resolution is so clear and simple that plenary consideration of the case may not even be warranted. The decision below is flatly irreconcilable with multiple precedents of this Court and others holding that a substantive legal defense to a damages claim, no less than a substantive affirmative element of the claim itself, must be tried according to normal rules of procedure and, where factual disputes remain, resolved by a jury upon proper demand. This Court could summarily reverse the decision below on the basis of those precedents and hold that the affirmative defense of exhaustion under the PLRA is subject to the same pre-trial and trial procedures as is any other legal defense under the Federal Rules of Civil Procedure. That result would still permit summary, threshold adjudication of the exhaustion defense where appropriate in accordance

with the usual pleading and summary judgment rules, but without overriding the Federal Rules and creating an entirely new procedure for preliminary adjudication of the defense, as the decision below mandates.

Whether summary reversal is appropriate or not, certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH MULTIPLE PRECEDENTS GOVERNING THE ADJUDICATION OF AFFIRMATIVE DEFENSES

A. Exhaustion Of Prison Remedies Under The PLRA Is A Substantive Legal Defense Subject To Normal Pleading And Proof Procedures

1. The PLRA was enacted in response to concerns that the federal courts were being swamped by too many non-meritorious prisoner lawsuits, which threatened to "submerge and effectively preclude consideration of [prisoner lawsuits] with merit." *Jones*, 549 U.S. at 203. To ensure that meritorious claims were not being lost in the flood, the PLRA included "reforms designed to filter out the bad claims and facilitate consideration of the good." *Id.* at 204.

The PLRA accomplishes that objective through two distinct means. First, the PLRA includes specific "judicial screening" requirements, which mark a "fundamental" departure from "the usual procedural ground rules." *Id.* at 212. The PLRA requires courts to screen prisoner complaints "before docketing, if feasible or ... as soon as practicable after docketing," and to dismiss a complaint if the

court determines that the complaint is "frivolous, malicious . . . fails to state a claim upon which relief may be granted" or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(a), (b). All these inquires are conducted by the court even "before any responsive pleading is filed—unlike in the typical civil case, defendants do not have to respond to a complaint covered by the PLRA until required to do so by the court, and waiving the right to reply does not constitute an admission of the allegations in the complaint." *Jones*, 549 U.S. at 214 (citing 42 U.S.C. § 1997e(g)(1), (2)).

Second, the PLRA requires plaintiffs to exhaust their prison grievance procedures before filing an action challenging any aspect of prison treatment or conditions. *See* 42 U.S.C. § 1997e(a). As this Court emphasized in *Jones*, the exhaustion requirement is *not* among or akin to the specific "judicial screening" requirements described above and set forth elsewhere in the statute. 549 U.S. at 214. In the PLRA, Congress "provided for judicial screening and *sua sponte* dismissal of prisoner suits" on four specific grounds, but "failure to exhaust was *notably not added in terms to this enumeration*." *Id.* (emphasis added); *see id.* at 216 (noting "the failure of Congress to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening"). Instead, exhaustion serves several distinct functions apart from screening out meritless complaints: it "improve[s] the quality of suits that are filed by producing a useful administrative record," *id.* at 204; it "provides prisons with a fair opportunity to correct their own errors," *Woodford*, 548 U.S. at 94; and it "reduces the quantity of prisoner suits

because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court," *id.* Because exhaustion is not among the specified grounds for threshold screening and dismissal of a case, and because it serves important functions apart from such screening, courts are not allowed to employ the unusual procedures necessary "to facilitate judicial screening of complaints," but instead must adjudicate exhaustion under the PLRA according to "normal pleading rules." *Id.*; *see also Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (*in forma pauperis* screening provisions "cannot serve as a fact-finding process for the resolution of disputed facts").

2. In *Jones*, this Court applied that analysis of the PLRA's exhaustion requirement to conclude that the requirement is an affirmative defense to be pleaded and proved by the defendant according to the normal procedures governing affirmative defenses, *not* an issue to be pleaded by the plaintiff and reviewed under special screening procedures. *Id.* at 213-16. Exhaustion is "typically" regarded as an affirmative defense, the Court explained, and nothing in the PLRA suggested that it was to be treated differently in cases falling within its scope. Indeed, the Court viewed the PLRA's silence on the question as "strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense." *Id.* at 212.

Some courts prior to *Jones* had held that the PLRA's screening mechanism would operate more effectively if exhaustion were treated as the plain-

tiff's burden so that it could be addressed summarily by the court; for example, plaintiffs could be required to attach documentary proof of exhaustion to their complaints, or to plead facts establishing exhaustion with specificity. *Id.* at 202, 205. The *Jones* Court, however, rejected those policy arguments as a basis for treating exhaustion under the PLRA differently from exhaustion in any other context. "[C]ourts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns," the Court emphasized, *id.* at 213, and "[g]iven that the PLRA does not itself require plaintiffs to plead exhaustion, such a result must be obtained by the process of amending the Federal Rules, and not by judicial interpretation," *id.* at 217 (quotation omitted). The Court returned to the same theme in the conclusion of its opinion, admonishing lower courts construing and applying the PLRA's exhaustion affirmative defense:

> We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks. We once again reiterate, however . . . that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.

Id. at 224.

B. Numerous Precedents Hold That Factually Disputed Affirmative Defenses Must Be Resolved By The Jury, Not The Court, Contrary To the Decision Below

1. As a general matter, claims—like petitioner's—seeking damages under 42 U.S.C. § 1983 are subject to the Seventh Amendment and thus must be tried by a jury upon proper demand by either party. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999). And it is generally recognized that "once the right to a jury trial attaches to a claim, it extends to all factual issues necessary to resolving that claim." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 170 (2d Cir. 2001). An affirmative defense, in turn, is equivalent to an element of a claim, except it is one for which the defendant bears the burden of proof. *See Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 984 (9th Cir. 2002) ("[E]lements and affirmative defenses are co-equal components of the jury's liability determination: Liability cannot be established until after the jurors unanimously agree that the elements are satisfied and they unanimously reject the affirmative defenses."); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2304 (3d ed. 1998) ("Unfortunately, there is a misconception in some quarters that the right to a trial by jury attaches because of the legal nature of a 'claim,' and does not attach to 'defenses.'").

Accordingly, this Court and many others have held that where a plaintiff's claim is subject to a jury trial, any legal affirmative defense to that claim must also be tried to a jury. *See, e.g., Byrd v. Blue*

Ridge Rural Elec. Coop., 356 U.S. 525, 538 (1958) (statutory immunity); *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988) (reliance on the advice of counsel), *overruled on other grounds by Schad v. Arizona*, 501 U.S. 624 (1991); *Nike, Inc. v. "Just Did It" Enterprises*, 6 F.3d 1225, 1233 (7th Cir. 1993) (affirmative defense of parody in a trademark case); *Kaplan v. Exxon Corp.*, 126 F.3d 221, 225 n.2 (3d Cir. 1997) (assumption of risk); *Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 548-49 (5th Cir. 2001) (defense to Title VII); *Intrastate Gas Gathering Co. v. Dow Chemical Co.*, 248 F.3d 1140 (5th Cir. 2001) (per curiam) (waiver); *Waco Int'l, Inc. v. KHK Scaffolding Houston, Inc.*, 278 F.3d 523, 534 (5th Cir. 2002) (fair use affirmative defense to trademark infringement claim); *Tri County Indus., Inc. v. District of Columbia*, 200 F.3d 836, 840 (D.C. Cir. 2000) (failure to mitigate); *Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266 (7th Cir. 1993) (insolvency in a contract and tort case); *Chocallo v. IRS*, 2007 WL 2071880, at *5 (E.D. Pa. July 17, 2007) (statute of limitations and exhaustion requirements under 26 U.S.C. § 7433).[1]

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[1] This rule arguably does not apply to affirmative defenses sounding in equity, but even the cases articulating that caveat presuppose that affirmative defenses at law must be tried to the jury. *See Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235, 242 (1922) ("Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury."); *Granite State Ins. Co. v. Smart Modular Techs., Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996) ("A litigant is not entitled to have a jury resolve a disputed affirmative defense if the defense is equitable in nature."). PLRA exhaustion

One of the most common affirmative defenses that courts have held must be tried to a jury is a statute of limitations. When there are disputed issues of material fact on a statute of limitations defense, courts have uniformly held that such issues must be tried to the jury with the rest of the claim. *See Meléndez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d 30, 38 (1st Cir. 2001); *Bertha Building Corp. v. Nat'l Theatres Corp.*, 248 F.2d 833, 835-36 (2d Cir. 1957); *Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992); *Chambliss v. Simmons*, 165 F. 419, 423 (5th Cir. 1908); *Horn v. A.O. Smith Corp.*, 50 F.3d 1365, 1370 (7th Cir. 1995); *United States v. Edwards*, 968 F.2d 1148, 1153 (11th Cir. 1992).

The statute of limitations example is significant because this Court in *Jones* specifically analogized the PLRA exhaustion defense to the typical statute of limitations defense. As the *Jones* Court observed, statutes of limitations "are often introduced by a variant of the phrase 'no action shall be brought'"—the same phrase that introduces the PLRA exhaustion requirement. 549 U.S. at 215, 220. Other courts have emphasized this analogy as well. *See Johnson v. Johnson*, 385 F.3d 503, 516 n.7 (5th Cir. 2004); *Ray v. Kertes*, 285 F.3d 287, 293 (3d Cir. 2002); *Casanova v. Dubois*, 304 F.3d 75, 78 n.3 (1st

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is mandated by statute and thus is resolved solely according to law and facts; it involves no exercise of equitable discretion by the Court and requires no weighing of equitable factors. *See Woodford*, 548 U.S. at 85 ("Exhaustion is no longer left to the discretion of the district court, but is mandatory.").

Cir. 2002); *Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999).

Under the foregoing precedents, it is perfectly clear that disputed facts underlying a PLRA exhaustion defense in a § 1983 damages action must be adjudicated by the jury, not resolved by the court in a summary preliminary proceeding.

2. The decision below cannot be reconciled with the fundamental rules reflected in the foregoing precedents.

The analytical heart of the Seventh Circuit's opinion is its contention that PLRA exhaustion should not be adjudicated like statutes of limitations or other typical legal defenses because the PLRA treats exhaustion as a matter of "judicial traffic control." App. 4a. It is thus akin to jurisdiction and venue, which are matters resolved by the court at the threshold of the case, not by the jury as it addresses the merits. App. 3a; *see also Owens v. Blagojevich*, 2008 WL 4792707, at *1 n.2 (S.D. Ill. Oct. 29, 2008) (*Pavey* "requir[es] the district court to conduct a hearing to determine whether it has proper jurisdiction over a prisoner's claims by resolving the exhaustion issue *before* ruling on the merits"). Accordingly, the decision concludes, the court can and must resolve disputed PLRA exhaustion disputes for itself, before allowing the parties to proceed with litigation on the merits of the prisoner's claim. This is wrong, and irreconcilable with this Court's precedents, in at least three respects.

a. To start, this Court has squarely held that "the PLRA exhaustion requirement is *not* jurisdictional," and that courts indeed may reach the merits

of claims before addressing potentially difficult exhaustion issues. *Woodford*, 548 U.S. at 101 (emphasis added). The Seventh Circuit's holding that exhaustion *must* be litigated and resolved before litigation on the merits may proceed conflicts directly with this holding of *Woodford*. And the court's flawed analogy to jurisdiction—shown to be erroneous by *Woodford*—leads inexorably to the flawed conclusion that, like disputed facts underlying jurisdictional issues, disputed facts underlying a PLRA exhaustion defense can be taken from the jury and resolved by the court. While it is true that, as this Court has explained, "in some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own," it is equally true that where "satisfaction of an essential element of a claim for relief is at issue . . . *the jury is the proper trier of contested facts*." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (emphasis added). As shown above, it is the latter rule, not the former, that obtains here: the PLRA makes exhaustion an essential element of a claim for relief in a prisoner suit under § 1983, *see Jones*, 549 U.S. at 211, though it operates to bar relief only when the defendant carries the burden of negating the element, *id.* at 211-12. Accordingly, the jury must be "the proper trier of contested facts" bearing on exhaustion.

The court's analogy to venue is flawed for the same reason. A court may resolve disputed facts related to venue precisely because venue is "*unlike* . . . affirmative defenses such as contributory negligence," in that venue "does not bear upon the substantive right to recover." *American Dredging Co. v.*

Miller, 510 U.S. 443, 454 (1994) (emphasis added). Because proof of exhaustion vel non bears directly upon a prisoner's right to recover under § 1983, contested facts concerning exhaustion can be resolved only by the jury.

Unlike jurisdiction and venue, affirmative defenses—including exhaustion—are not subject to resolution by preliminary procedures. *See* Fed. R. Civ. P. 12(i) (limiting preliminary hearings to those defenses listed in Rule 12(b) and motions under Rule 12(c)); 5C Wright & Miller, *supra*, § 1373 ("[Rule 12(i)] only authorizes a preliminary hearing for the Rule 12(b) defenses and for a motion under Rule 12(c) . . . . [It] cannot be used . . . to adjudicate other matters, such as affirmative defenses."). Unless decided on the pleadings alone—as where, for example, the complaint's own allegations establish the defense, *see Jones*, 549 U.S. at 215—an affirmative defense must be tested at summary judgment, *see* Fed. R. Civ. P. 12(d), 56(b), with factual disputes underlying the defense reserved for trial, *see* 5 Wright & Miller, *supra*, § 1277. The decision below departs dramatically from those basic procedures, contradicting the Federal Rules, this Court's decisions in *Jones* and *Woodford*, and the Seventh Amendment's protection of the right to trial by jury of material factual disputes in actions at law.

b. This Court in *Jones* also squarely rejected the central premise of the decision below, *viz.*, that the PLRA exhaustion defense is merely a matter of "judicial traffic control," employed by courts solely as a threshold screen to determine "whether [the court] is to decide the case or the prison authorities are to."

App. 4a. In contrast to that analysis, the Court in *Jones* repeatedly noted "the *failure* of Congress to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening." *Id.* at 216 (emphasis added); *see id.* at 214 (same). Exhaustion differs from a mere judicial traffic control device, the Court explained, because it serves the more substantive purposes of creating an administrative record useful for litigation. *Id.* at 204. For these reasons, the Court concluded, exhaustion *must* be adjudicated according to the "normal pleading rules," rather than special preliminary screening procedures. *Id.* And as just shown, the "normal pleading rules" require that affirmative defenses be treated like substantive claim elements, to be analyzed successively on the complaint's allegations at the pleading stage, on the record facts viewed most favorably to the non-movant at summary judgment, and on the disputed factual record by the jury at trial. *See supra* at 16. The Seventh Circuit's holding that special preliminary procedures for adjudicating exhaustion are permissible and appropriate to serve the judicial traffic control function of exhaustion cannot be reconciled with *Jones*. *See Bryant v. Rich*, 530 F.3d 1368, 1380 (11th Cir. 2008) (Wilson, J., concurring in part, dissenting in part) (stating "I do not think [a preliminary proceeding to resolve factual PLRA exhaustion disputes judicially] can be reconciled with the Supreme Court's recent decision in *Jones*").

c. Finally, the decision below conflicts with decisions of this Court and others holding that the Seventh Amendment requires the jury to resolve disputed facts underlying a legal claim before they are

separately resolved by the court in connection with an equitable or other judge-determined issue. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-73 (1962); *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974). Consistent with that principle, other federal circuits have held that when the merits of a claim involve disputed facts that overlap with "threshold" issues such as jurisdiction and venue, the resolution of such common facts must be reserved for the jury. *See DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1291 (Fed. Cir. 2008); *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 162-63 (1st Cir. 2007); *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987); *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965); *Borg v. L & J Energy, Inc.*, 1990 WL 122225 (W.D. Mich. May 25, 1990); *Vibber v. U.S. Rubber Co.*, 255 F. Supp. 47, 50 (S.D.N.Y. 1966); *Kierulff Assocs. v. Luria Bros. & Co.*, 240 F. Supp. 640, 642 (S.D.N.Y. 1965). *See generally* 3 James Wm. Moore et al., Moore's Federal Practice § 22.01(5)(d). The decision below conflicts with these precedents because it allows—indeed requires—the court to resolve the exhaustion defense, including all underlying factual disputes, prior to any litigation on the merits, even where, as here, the facts underlying the exhaustion defense overlap substantially with the substantive allegations of wrongdoing.

The decision below, in fact, explicitly recognizes the apparent conflict with these precedents. App. 5a. In an effort to avoid the conflict, the decision takes the unprecedented step of requiring the court to make its findings first, then allowing the jury to

"reexamine" the factual findings made in connection with the affirmative defense: "[I]f there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies." App. 6a. According to the decision below, policy concerns behind the PLRA simply compel this departure from this Court's established Seventh Amendment precedent: "The alternative of trying the merits before exhaustion, as under the *Beacon Theatres* line of cases, is unsatisfactory in the present setting because it would thwart Congress's effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies." App. 5a.

The resort to PLRA policy as a justification for disregarding this Court's Seventh Amendment precedents is obviously unavailing. It is another specie of the error committed by the court in inventing a special procedure for handling the exhaustion defense, rather than abiding by the Federal Rules, as this Court unambiguously mandated in *Jones*. The asserted policy of the PLRA is no more a justification for ignoring this Court's decisions than it is for rewriting the Federal Rules of Civil Procedure.

What is more, the novel procedure proposed by the Seventh Circuit does not even succeed in its stated objective of protecting jury trial rights secured by the Seventh Amendment. The procedure does allow a jury to decide disputed facts previously resolved by the judge in deciding the exhaustion defense, but only if the judge ruled that there *was* ex-

haustion. Where the judge finds a *lack* of exhaustion and dismisses the case, by contrast, there is *no* opportunity for the jury to reexamine the judge's underlying factual findings that relate to the merits.

The inadequacy of the court's resolution illustrates the consequences of this kind of judicial ad hockery. Both the Federal Rules and this Court's Seventh Amendment precedents already establish wholly adequate and appropriate procedures for adjudicating claims and defenses fairly while protecting jury trial rights. Yet the court disregarded both and adopted its own flawed procedure for policy reasons that do not even accurately reflect PLRA policies. As explained in *Jones* and elaborated above, the PLRA exhaustion defense is *not* solely concerned with screening cases out of court at the earliest possible hour in litigation. Of course, even a well-founded grounding in policy provides no justification for a court to depart from the usual federal procedures governing affirmative defenses, as this Court expressly held in *Jones*. It is all the worse to craft and impose new procedures on the basis of misguided policy perceptions. Either way, the correct approach to adjudicating the PLRA exhaustion defense is simply to follow the rules and procedures already in place for resolving any affirmative defense. Certiorari—if not summary reversal—is warranted to make that point clear.

II. THE LOWER FEDERAL COURTS ARE IN DISARRAY OVER THE PROPER PROCEDURES FOR ADUJUDICATING THE PLRA EXHAUSTION DEFENSE

Certiorari or summary reversal is also appropriate because of the widespread conflict and uncertainty in the federal courts over the proper procedure for adjudicating the PLRA exhaustion defense—specifically, whether a jury may resolve disputed facts concerning its application. The lower courts have adopted at least three different procedural approaches, and courts across the country have expressed confusion and the need for further guidance.

1. The majority of courts adhere to the "usual procedure" called for by the Federal Rules to adjudicate the affirmative defense of exhaustion: a Rule 56(c) motion for summary judgment when appropriate on the undisputed record, with factual disputes reserved for trial. That approach has been followed by the Second, Third, Fifth, Eighth, and Tenth Circuits. *See Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006) (addressing exhaustion at summary judgment); *Williams v. Beard*, 482 F.3d 637, 639 (3d Cir. 2007) (reversing grant of summary judgment on exhaustion and remanding for further proceedings); *Hinojosa v. Johnson*, 277 F. App'x 370, 379-80 (5th Cir. 2008) (addressing exhaustion at summary judgment); *Foulk v. Charrier*, 262 F.3d 687, 697-98 (8th Cir. 2001) (reviewing evidence elicited at trial as to whether prisoner exhausted available remedies); *Fields v. Okla. State Penitentiary*, 511 F.3d 1109, 1112 (10th Cir. 2007) (addressing exhaustion

at summary judgment). The Seventh Circuit was counted among this group before the opinion below. *See Dale v. Poston*, 548 F.3d 563, 564 (7th Cir. 2008) (jury trial on exhaustion after remand on appeal from summary judgment); *Kaba v. Stepp*, 458 F.3d 678, 686 (7th Cir. 2006) (reversing summary judgment on exhaustion and remanding for further proceedings).

In addition, district courts in the First and Second circuits have expressly held that because failure to exhaust is an affirmative defense under the PLRA, disputed factual issues about PLRA exhaustion must be tried to a jury, in the usual course. *See Maraglia v. Maloney*, 499 F. Supp. 2d 93, 97-98 (D. Mass. 2007) ("[D]isputed issues of fact must be resolved by the jury and not the Court."); *Lunney v. Brureton*, 2007 WL 1544629, at *10 n.4 (S.D.N.Y. May 29, 2007). These courts have rejected decisions directing factfinding by judges on the ground that they "pre-date" *Jones*, do not conform to the standard procedure of the Federal Rules, and rest on "perceived policy concerns" instead of the statutory rules. *Maraglia*, 499 F. Supp. 2d at 94; *see also Lunney*, 2007 WL 1544629, at *10 n.4 (doubting, in light of *Jones*, the validity of previous caselaw directing trial courts to resolve disputed factual issues).[2]

2. Two circuits—the Ninth and Eleventh—have expressly declined to follow the "usual practice" under the Federal Rules for adjudicating the PLRA af-

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[2] Another district court in the Second Circuit has held, however, that the exhaustion defense should be tried to the court. *See Amador v. Superintendents of Dep't. of Correctional Svcs.*, 2007 WL 4326747, at *5 (S.D.N.Y. Dec. 4, 2007).

firmative defense. These courts instead characterize exhaustion as a "matter in abatement" and hold that the exhaustion defense must be raised in an "unenumerated" Rule 12(b) motion to dismiss. *See Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003); *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008). Because a "matter in abatement" does not go to the merits of a claim, this approach requires judges to resolve any factual disputes about exhaustion just as they would with a "jurisdictional or related type of motion." *See Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir. 1988) (citation omitted).

The Ninth Circuit actually adopted the "matter in abatement" approach as a general method for addressing exhaustion requirements long before Congress enacted the PLRA. *See Ritza*, 837 F.2d at 368-69 (failure to exhaust intra-union remedies); *Stauffer Chem. Co. v. FDA*, 670 F.2d 106, 108 (9th Cir. 1982) (failure to exhaust intra-agency review process); *Studio Elec. Technicians Local 728 v. Int'l Photographers of Motion Picture Indus. Local 659*, 598 F.2d 551, 552 n.2 (9th Cir. 1979) (failure to exhaust remedies required by the Labor Management Relations Act). Thus, when confronted in *Wyatt* with the question of how to adjudicate the PLRA exhaustion requirement, the Ninth Circuit simply applied its existing precedent to this affirmative defense. *See* 315 F.3d at 1119-20.

But *Wyatt* was decided before this Court's decision in *Jones*, and that circuit appears not to have revisited this issue since. However, in the aftermath of *Jones*, courts have expressed doubt that *Wyatt*'s

"matter in abatement" approach remains viable. *See, e.g.*, *Percival v. Knowles*, 2007 WL 2827789, at *5 (E.D. Cal. Sept. 27, 2007) (holding "that a motion for summary judgment" and not an unenumerated Rule 12(b) motion "is the proper mechanism for resolving the question of whether plaintiff satisfied the exhaustion requirement"); *Lunney*, 2007 WL 1544629, at *10 n.4.[3]

Despite the evident conflict between the Ninth Circuit's precedent and this Court's decision in *Jones*, the Eleventh Circuit recently adopted the Ninth Circuit's approach and held that PLRA exhaustion should be adjudicated as a "matter in abatement" rather than an affirmative defense. *Bryant*, 530 F.3d at 1376. Over a vigorous dissent, the Eleventh Circuit in *Bryant* adopted the holding of the Ninth Circuit that "exhaustion should be decided on a Rule 12(b) motion to dismiss" and that because "exhaustion . . . is treated as a matter in abatement and not an adjudication on the merits, it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes." *Id.* Notably, the majority's conclusion was premised on the policy-driven determination that putting factual disputes about the affirmative defense of exhaustion to a jury would "unnecessarily undermine Congress's

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[3] Yet another district court in the Ninth Circuit has held that exhaustion should be tried to a jury, even though that circuit has adopted a contrary position. *See Baines v. Maddock*, 2007 WL 173948, at *6 (S.D. Cal. Jan. 3, 2007) (finding "a genuine issue of material fact as to whether Plaintiff exhausted his administrative remedies" and noting that "Plaintiff . . . will be exercising his right to have a jury try this issue as to exhaustion of administrative remedies at trial").

intent in enacting the PLRA's exhaustion requirement." *Id.*

The dissent in *Bryant* strongly rejected this view. It warned that the approach cannot "be reconciled with the recent Supreme Court decision in *Jones v. Bock*." 530 F.3d at 1379 (Wilson, J., concurring in part and dissenting in part). The dissent observed that the majority's (and the Ninth Circuit's) approach conflicts with "usual procedural practice by directing district courts to treat failure to exhaust not as an affirmative defense, but to consider it on a 'motion to dismiss' not enumerated in Rule 12(b)." *Id.* at 1380. "More strikingly," the dissent continued, "rather than submitting genuine issues of material fact to the jury, the majority compels district courts to decide these factual issues." *Id.* "In the context of failure to exhaust under the PLRA," the dissent emphasized, "the Supreme Court has indicated that deviations from the usual procedural practice 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 1380 n.3 (citing 549 U.S. at 213).

3. In the decision below, the Seventh Circuit has now adopted yet a third position, by characterizing exhaustion as an "issue of judicial traffic control." The decision below expressly rejects the Ninth and Eleventh Circuits' "unenumerated" Rule 12(b) motion as a procedural vehicle for raising the affirmative defense, conceding that under *Jones* a defendant must plead failure to exhaust pursuant to Rule 8(c). App. 3a. But the decision also rejects the majority approach of simply adhering to the usual procedure under the Federal Rules for adjudicating affirmative

defenses. Rather than abide by the standard pleading, summary judgment, and trial procedure mandated by the Rules for resolving claims and defenses, the decision below mandates a distinct procedure unique to resolving a disputed PLRA defense. Under the procedure, once a PLRA exhaustion defense is pleaded by a defendant, a district judge must convene a special evidentiary hearing focusing solely on the exhaustion defense, before litigation on the merits may proceed. The judge may permit "discovery relating to exhaustion he deems appropriate." App. 6a. Then, only "[i]f and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery . . . on the merits." *Id.*[4]

The Seventh Circuit is the only court of appeals thus far to categorically preclude litigation on the merits of a suit—including any discovery—pending the court's resolution of the exhaustion affirmative defense.[5]

4. Given the various approaches taken by the courts of appeals, it can be no surprise that the dis-

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[4] The Seventh Circuit's opinion adds that "if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies." App. 6a.

[5] The First Circuit, however, has on at least one occasion, without discussion, authorized a district court to find facts on the issue of exhaustion before proceeding with the merits of a prisoner's appeal. *Casanova v. Dubois*, 304 F.3d 75, 77 (1st Cir. 2002) ("We remanded this case to the district court for additional fact-finding with respect to whether the exhaustion requirement of the [PLRA] precludes the appellants' lawsuit.").

trict courts, which bear the brunt of this uncertainty, have frequently expressed a need for guidance on the proper method for adjudicating the affirmative defense of failure to exhaust available remedies. "Courts across the country are divided," one recently noted. *Singleton v. Johnson*, 2008 WL 3887633, at *1 (S.D. Ga. Aug. 18, 2008). Another court stated that "there is substantial ground for difference of opinion," yet "no guidance" on the issue. *Gilmore v. Stalder*, 2008 WL 4155332, at *2-3, *5 (W.D. La. Sept. 8, 2008); s*ee also Finch v. Servello*, 2008 WL 4527758, at *8 (N.D.N.Y. Sept. 29, 2008) (seeking special briefing on "the question of whether the disputed factual issue can be decided in a hearing or if it must be decided by a jury"); *Amador v. Superintendent of Dept. of Corr. Svcs.*, 2007 WL 4326747, at *5 n.7 (S.D.N.Y. Dec. 2, 2007) (recognizing conflicting caselaw and noting that "[i]t is unclear whether factual disputes regarding the exhaustion defense should ultimately be decided by the court or by a jury"). There is no good reason to require the district courts administering the requirements of the PLRA to remain mired in such confusion and uncertainty on such a crucial procedural issue. This Court should grant review to provide them the guidance they need.

III. THE PROPER ADJUDICATION OF THE PLRA EXHAUSTION DEFENSE IS AN IMPORTANT AND RECURRING ISSUE

1. The issue presented here is "important, both procedurally and substantively and deserve[s] further consideration." *Gilmore*, 2008 WL 4155332, at *3. The cases discussed in the previous section

indicate the frequency with which courts are faced with the question of when and how to adjudicate the PLRA exhaustion issue, and the uncertainty they face in answering it. And this Court itself has recognized that disputes about exhaustion under the PLRA "occur frequently." *Woodford*, 548 U.S. at 101 n.5.

This Court should not allow the already substantial uncertainty concerning the issue presented here to continue or, inevitably, broaden further. Although *Jones* explicitly held that the PLRA's exhaustion requirement is an affirmative defense to be adjudicated according to the "usual practice" under the Federal Rules, *see supra* at 15, three circuits have adopted two different types of special procedures to resolve the defense, neither of which reflects "usual practice" under the Rules. The district courts are rightly complaining about the lack of clear guidance on what is or should be a straightforward issue. The PLRA is specifically designed to make prisoner litigation more efficient to courts and thus more fair to all parties—including prisoners with meritorious claims. The current uncertainty over how to litigate the exhaustion defense—a crucial feature of the PLRA and a major issue in much PLRA litigation—plainly thwarts that fundamental statutory objective.

2. Beyond the adverse consequences of general uncertainty over what approach is lawful and appropriate, the specific approach adopted by the Seventh Circuit will itself have numerous adverse, and unnecessary, consequences for prisoner litigation in

courts within the Seventh Circuit, and in courts elsewhere if the approach is adopted more broadly.

First, the decision below will impose costly delays and further burden district courts. The court of appeals held that courts must immediately stay all proceedings and hold an evidentiary hearing every time exhaustion is pleaded by a defendant. App. 6a. Because a plaintiff need not demonstrate exhaustion in his complaint, *see Jones*, 549 U.S. at 212, and because a defendant must plead the exhaustion defense or risk waiver, *id.*, a defendant has every incentive to plead non-exhaustion in each case and abandon the defense only when it becomes clear that a plaintiff exhausted his administrative remedies. But this incentive of notice pleading, coupled with the Seventh Circuit's directive to resolve exhaustion before litigation may proceed, will inevitably require district courts to hold preliminary hearings on exhaustion in virtually every case governed by the PLRA.

Second, forcing courts to hold preliminary hearings in every case would severely prejudice litigants with meritorious claims. The screening requirements of 42 U.S.C. § 1997e(c) (prisoner cases) and 28 U.S.C. § 1915A (*in forma pauperis* filings) already delay by many months the actual filing of a complaint and the call for an answer. Barring merits-related litigation until after a preliminary hearing on exhaustion can easily delay even the most basic progress on a case for a year or more. And it is *meritorious* claims that will suffer the most under the Seventh Circuit's novel scheme, because defendants now have an incentive to forcefully litigate even

marginal exhaustion defenses in any case that presents a risk on the merits. This result runs contrary to Congress's stated intent in enacting the PLRA to "improve the quality of prisoner suits," *Woodford*, 548 U.S. at 94, without "prevent[ing] inmates from raising legitimate claims," *id.* at 117 (Stevens, J., dissenting).

Finally, the decision below will disrupt usual procedures for the appointment of counsel. Courts are often reluctant to appoint counsel for prisoner-plaintiffs in the early stages of litigation. *See Pruitt v. Mote*, 503 F.3d 647, 661 (7th Cir. 2007) (en banc) (Rovner, J., concurring) (noting that requests for counsel during pre-trial phases of a case are frequently denied). The usual presumptions that attach to pleadings and the prohibition on fact-finding at summary judgment allow courts to defer decisions on appointing counsel until the merits of a claim become apparent. *Id.* Forcing courts to decide whether to appoint counsel for preliminary hearings on exhaustion—well before the merits of a case come into view—will compromise their ability to efficiently deploy scarce resources. Yet without the benefit of counsel for a fact-finding hearing on exhaustion, *pro se* litigants will be at a disadvantage in gathering and presenting evidence establishing their efforts to exhaust (or establishing the prison's efforts to thwart them from doing so).

The novel procedure invented by the court of appeals might allow lower courts to more quickly dispose of some meritless prisoner claims. But it also might not. And it might well interfere with litigation of meritorious claims. What should ultimately

matter most is that "[o]ur legal system . . . remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled *according to the law*." *Jones*, 549 U.S. at 202 (emphasis added). The decision below breaches that commitment because it does not provide for prisoner claims to be handled "according to the law," but instead according to an ad hoc structure—notably, one not designed by the legislators actually responsible for fixing the rules governing prisoner litigation. But as this Court rightly noted in *Jones*, whether the PLRA exhaustion defense should be treated differently from every other affirmative defense is a choice for Congress to make, not a court of appeals.

CONCLUSION

For the foregoing reasons, the petition should be granted, or the decision below should be summarily reversed.

Respectfully submitted,

DAVID M. FRIEBUS
BABBITT, LAND, SILVERSTEIN & WARNER LLP
332 South Michigan Ave.
Suite 710
Chicago, Illinois 60604
(312) 427-5555

JONATHAN D. HACKER
(*Counsel of Record*)
JUSTIN FLORENCE*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted only in Massachusetts*

WALTER DELLINGER**
HARVARD LAW SCHOOL SUPREME COURT AND APPELLATE PRACTICE CLINIC
***May be contacted at O'Melveny & Myers LLP*

January 12, 2009

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1426

CHRISTOPHER PAVEY,

Plaintiff-Appellee,

v.

PATRICK CONLEY, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:03-CV-0662-RLM-CAN

Robert L. Miller, Jr., Chief Judge.

ARGUED APRIL 9, 2008—DECIDED JUNE 5, 2008
AMENDED SEPTEMBER 12, 2008

Before POSNER, RIPPLE, and MANION, *Circuit Judges.*

POSNER, *Circuit Judge.* The question presented by this interlocutory appeal under 28 U.S.C. § 1292(b) is whether a prisoner plaintiff in a suit for damages governed by the Prison Litigation Reform Act is entitled by the Seventh Amendment to a jury

trial on any debatable factual issues relating to the defense of failure to exhaust administrative remedies. The district court answered yes.

The prisoner filed this suit under 42 U.S.C. § 1983 against guards who he claimed had used excessive force in removing him from his cell, as a result breaking his arm. In their answer the defendants claimed that the prisoner had failed to exhaust his administrative remedies because he hadn't filed a timely grievance with the prison authorities. He countered with an affidavit which stated that he had been unable to exhaust those remedies because he could not prepare the grievance himself, as he is left-handed and it was his left arm that was broken; and that he was transferred to another prison before a promised investigation of the incident was conducted, which presumably prevented him from obtaining the facts that he needed in order to be able to press a grievance effectively. The defendants respond that any factual issues relating to the defense of failure to exhaust administrative remedies should be resolved by the judge at the outset of the litigation without a jury unless of course the judge decides to convene an advisory jury.

The Prison Litigation Reform Act provides that "no action shall be brought [under federal law] with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court has held that the failure to satisfy this requirement is an affirmative defense, *Jones v. Bock*, 549 U.S. 199 (2007), which means that the plaintiff need not plead that he exhausted his administrative

remedies. Only one appellate court has weighed in on the question whether there is a right to a jury trial if genuine issues of material fact concerning compliance with the duty to exhaust are presented: in *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003), the Ninth Circuit held that because previous Ninth Circuit cases had held that a failure to exhaust remedies is a "matter in abatement," properly raised not by a motion for summary judgment but by a motion under Fed. R. Civ. P. 12(b) (an "unenumerated Rule 12(b) motion," the court called it), the judge must decide exhaustion even if that requires him to make findings of fact.

The Ninth Circuit's approach is not persuasive, although we agree with its result. Rule 12(b) does not say anything about who finds the facts. It just permits certain defenses, such as lack of subject-matter or personal jurisdiction, to be presented by motion rather than only in the answer to the complaint. Yet the defendants are right that not every factual issue that arises in the course of a litigation is triable to a jury as a matter of right, even if it is a suit at law (rather than in equity) within the meaning of the Seventh Amendment. The clearest example is subject-matter jurisdiction; often it turns on factual issues that may be genuinely debatable, but even if so the issues are resolved by the judge. *E.g.*, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-90 (1936); *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132, 134-35 (7th Cir. 1996). The same is true of factual issues relating to the defense of lack of personal jurisdiction or venue, *e.g.*, *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 712-13 (7th Cir. 2002); *Marra v. Papandreou*, 216 F.3d 1119, 1122 (D.C. Cir.

2000)—though these defenses are not jurisdictional in the sense of requiring the judge to decide them even if the parties do not make an issue of them—and to motions to abstain in favor of another court, or an agency. *E.g.*, *Ambrosia Coal & Construction Co. v. Pages Morales*, 368 F.3d 1320, 1331-32 (11th Cir. 2004); *cf. Majors v. Engelbrecht*, 149 F.3d 709, 711 (7th Cir. 1998). A decision to relinquish supplemental jurisdiction to the state courts, *see* 28 U.S.C. § 1367, is likewise made by the judge even if there are contestable factual questions bearing on the decision.

The generalization that emerges from these examples and others that might be given is that juries do not decide what forum a dispute is to be resolved in. Juries decide cases, not issues of judicial traffic control. Until the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to. In this case, should the defendants' contention that the prisoner inexcusably failed to file a timely grievance be sustained, he would no longer have any administrative remedies. But in many cases the only consequence of a failure to exhaust is that the prisoner must go back to the bottom rung of the administrative ladder; and in such a case one could envision a series of jury trials before there was a trial on the merits: a jury trial to decide exhaustion, a verdict finding that the prisoner had failed to exhaust, an administrative proceeding, the resumption of the litigation, and another jury trial on failure to exhaust. That distinguishes the issue of exhaustion from deadline issues that juries decide. A statute of limitations defense if successfully interposed ends the litigation rather than shunting

it to another forum. If the defense is rejected, the case proceeds in the court in which it is filed.

A peculiarity of this case is a possible overlap between the factual issues relating to exhaustion and those relating to the merits of the excessive-force claim. The broken arm is of course germane to both, and while the fact that it was broken is conceded, the severity of the break could well be an issue common to both the allegedly inexcusable failure to exhaust and the excessiveness of the force that caused the break. By analogy to the cases that require that claims at law be decided before equitable claims when both types of claim are presented, so that the judge's decision on the latter does not preclude or otherwise affect the jury's determination of the former, *e.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508-11 (1959); *Williams Electronics Games, Inc. v. Garrity*, 366 F.3d 569, 577-78 (7th Cir. 2004), we think that any finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if—and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits. The alternative of trying the merits before exhaustion, as under the *Beacon Theatres* line of cases, is unsatisfactory in the present setting because it would thwart Congress's effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies. *Jones v. Bock*, *supra*; *Porter v. Nussle*, 534 U.S. 516, 523-25 (2002); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002). A jury might decide the merits of a case that should never have gotten to the merits stage because the judge should have found that the prisoner had failed to exhaust his administrative

remedies.

The sequence to be followed in a case in which exhaustion is contested is therefore as follows: (1) The district judge conducts a hearing on exhaustion and permits whatever discovery relating to exhaustion he deems appropriate. (2) If the judge determines that the prisoner did not exhaust his administrative remedies, the judge will then determine whether (a) the plaintiff has failed to exhaust his administrative remedies, and so he must go back and exhaust; (b) or, although he has no unexhausted administrative remedies, the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), and so he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround); or (c) the failure to exhaust was the prisoner's fault, in which event the case is over. (3) If and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.

We emphasize that in the ordinary case discovery with respect to the merits should be deferred until the issue of exhaustion is resolved. If merits discovery is allowed to begin before that resolution, the statutory goal of sparing federal courts the burden of prisoner litigation until and unless the

prisoner has exhausted his administrative remedies will not be achieved. But we do not want to place the district courts of this circuit in a straitjacket. There may be exceptional cases in which expeditious resolution of the litigation requires that some discovery be permitted before the issue of exhaustion is resolved. The present case is one in which the exhaustion issue and the merits issue share common facts (the facts relating to the gravity of the injury to the plaintiff's arm), so that discovery targeted on exhaustion may well produce evidence or leads relating to the merits.

The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

SIR CHRISTOPHER R. PAVEY, Plaintiff	)	
vs.	)	CAUSE NO.: 3:03-CV-66 RM
P. CONLEY, *et al.*, Defendants	)	

OPINION AND ORDER

The defendants, by counsel, the Indiana Attorney General, filed a motion asking the court to amend its orders to permit an interlocutory appeal.

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b).

This is a civil rights case brought by an inmate pursuant to 28 U.S.C. § 1983. The defendants assert that the plaintiff did not exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). In reversing this court's grant of summary judgment, the court of appeals found that a genuine issue of fact existed as to the exhaustion defense, and remanded the case for further proceedings. This court entered a scheduling order setting discovery and dispositive motion deadlines. When the defendants did not answer discovery, the court granted the plaintiff's motion to compel and denied the defendants' motion to reconsider the order compelling them to answer discovery. The court then set the case for trial. These three orders give rise to the defendants' desire to take an interlocutory appeal.

Counsel for the defendant has argued unsuccessfully in several cases that the affirmative defense of failure to exhaust administrative remedies must be resolved before a defendant can be compelled to respond to discovery addressing the merits of a prisoner plaintiff's claims. They further contend that when a genuine issue of fact exists as to the exhaustion defense, that question must be resolved before the presentation of any other evidence. Finally, they assert that where a genuine issue of fact exists as to the exhaustion defense, that question of fact must be resolved by the judge and not by a jury.

Counsel for the defendant appears to recognize that these assertions are not consistent with the standard procedures for conducting a federal trial and acknowledges that no controlling authority

exists on these questions. Nevertheless, counsel argues that these deviations from normal trial procedure are required by the mandate that "No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

These are controlling questions of law. "As these are questions of first impression, the application of these statutes to the facts alleged here is certainly contestable, and the resolution of these issues will facilitate the conclusion of the litigation." *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1007-1008 (7th Cir. 2002).

But for an interlocutory appeal, these questions (which have been raised in other cases as well) would almost always escape appellate review. Because of the far-reaching impact on prisoner litigation that these new interpretations would impose, and because of the frequency and forcefulness with which they have been presented by the Indiana Attorney General, the court is persuaded that it is appropriate to permit the defendants to seek an interlocutory appeal on these questions.

For the foregoing reasons, the court:

(1) GRANTS the motion (Docket No. 85);

(2) AMENDS this court's orders of November 16, 2006 (Docket No. 80), November 16, 2006 (Docket No. 81), and November 21, 2006 (Docket No. 84) to add the following paragraph to each:

Pursuant to 28 U.S.C. § 1292(b), the court certifies these three questions for interlocutory appeal:

> 1. Whether 42 U.S.C. § 1997e(a) precludes discovery addressing the merits of a prisoner plaintiff's claims until after the resolution of the affirmative defense of failure to exhaust administrative remedies.
>
> 2. Whether 42 U.S.C. § 1997e(a) requires that genuine issues of fact related to the affirmative defense of exhaustion of administrative remedies must be resolved before the presentation of any other evidence at trial.
>
> 3. Whether 42 U.S.C. § 1997e(a) requires that genuine issues of fact related to the affirmative defense of exhaustion of administrative remedies must always be resolved by a judge and not by a jury.

and,

(3) ORDERS that these amended orders be deemed entered as of this date for purposes of computing the time for filing a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

SO ORDERED.

ENTERED: December 14 , 2006

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

SIR CHRISTOPHER R. PAVEY,	)	
Plaintiff	)	CAUSE NO.:
vs.	)	
	)	3:03-CV-66 RM
P. CONLEY, *et al.*,	)	
Defendants	)	

OPINION AND ORDER

The defendants, by counsel, move to reconsider two of this court's prior orders. It is appropriate for the court to begin where the defendants' brief ends. On March 3, 2006, the court of appeals issued its order reversing this court's grant of summary judgment. Nineteen days later, on March 22, Christopher R. Pavey, a *pro se* prisoner, signed an untimely jury demand. More than three months later, on July 31, the defendants moved to strike that jury demand arguing that it was more than two years late. When the Magistrate Judge denied that motion, they filed a motion to reconsider, which was also denied. Though the Magistrate Judge did not cite FED. R. CIV. P. 39(b) in either of his rulings, it is clear that he exercised the discretion conferred by that rule to order a jury trial. Though the defendants did not file an objection pursuant to FED. R. CIV. P. 72(a), and though they acknowledge that "they may not now assign error to that ruling as matter of right" (Docket No. 83 at 15), they

nevertheless, ask the court to distinguish the Magistrate Judge's ruling from a prior ruling by the undersigned judge in a different case. This court declines to attempt to render an advisory analysis distinguishing the discretion exercised by two different judges in two different cases.

Returning to the primary focus of the defendants' brief, they argue that disputed issues of fact related to their affirmative defense of exhaustion should be tried to the court rather than to a jury. They concede that there is no binding precedent addressing this specific affirmative defense, but such a narrow focus is unnecessary. Neither their brief nor any of their cited cases squarely address the fundamental principle of federal law that "federal policy favor[s] jury decisions of disputed fact questions . . . ." *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958).

The defendants argue that the judge should resolve the fact questions related to the affirmative defense of exhaustion because Congress wanted to reduce prisoner litigation. It is unnecessary for this court to address either Congressional intent or even Congressional authority in regard to depriving inmates of their right to a jury determination since the PLRA did not expressly speak to this question. Without an unequivocal statute clearly denying the right to a jury, the presumption is that fact questions are resolved by juries. "Although district courts are expert in finding facts, at the summary judgment stage disputed facts must be reserved for the jury." *Nike, Inc. v. "Just Did It" Enterprises*, 6 F.3d 1225, 1233 (7th Cir. 1993) (holding that the

affirmative defense of parody is a jury question in a trademark case.); *see also Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266 (7th Cir. 1993) (holding that it was proper for the jury to resolve a disputed issue of fact related to an affirmative defense involving insolvency in a contract and tort case.), and *Campbell v. Nordco Products*, 629 F.2d 1258 (7th Cir. 1980) (holding that the jury should resolve a disputed issue of fact related to an affirmative defense involving assumption of the risk.).

Though the defendants question the applicability of *Byrd v. Blue Ridge*, that case demonstrates the strength of the federal presumption of jury adjudications. *Byrd* involved the adjudication of a state law statutorily created cause of action which afforded no jury trial right. Yet neither an unambiguous precedent, nor principles of comity were sufficient to overcome the Supreme Court's stated presumption of jury determinations of disputed facts in federal court.

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence -- if not the command -- of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958) (footnote omitted). Though the defendants argue that this case is a constitutional, rather than a statutory or common-law claim, there is no logic in

arguing that constitutional claimants should be denied the right to a jury trial while lesser claimants are afforded it.

Further, the defendants argue that the exhaustion question must be resolved before the court may proceed any further with this lawsuit. They argue that because the PLRA states that "No action shall be brought . . . by a prisoner . . . until such administrative remedies as are available are exhausted" 42 U.S.C. § 1997e(a), that not even discovery related to the merits of the case can occur. To the extent possible, that has already happened in this case. Discovery was stayed and the defendants filed a summary judgment motion. Because exhaustion is an affirmative defense, the burden was on the defendants and it has been determined that they did not carry their burden because a genuine issue of fact exists. Now it is time for this case to proceed because, though it is still necessary to determine whether the plaintiff exhausted his administrative remedies, the time for making that determination shifted when the defendants lost on summary judgment. The defendants might yet prevail on their exhaustion defense, but to do so they must convince the fact finder, in this case a jury, to resolve those disputed issues of fact in their favor. The time for presenting affirmative defenses to the jury is no different in this case than it is in any other: after the plaintiff has rested his case in chief.

Before trial, the plaintiff is entitled to conduct discovery. In this case the plaintiff has outstanding discovery that went unanswered for six months. The motion to compel was granted and the defendants

were ordered to respond to the discovery on or before December 15, 2006.

For the forgoing reasons, the motion to reconsider (Docket No. 82) is **DENIED**.

SO ORDERED.

ENTERED: November 21, 2006

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

SIR CHRISTOPHER R. PAVEY,	)	
Plaintiff	)	CAUSE NO.:
vs.	)	
	)	3:03-CV-66 RM
P. CONLEY, *et al.*,	)	
Defendants	)	

ORDER

Christopher Pavey, a *pro se* prisoner, filed a motion to compel responses to his discovery filed on June 21, 2004. Then in 2004, discovery was stayed pending resolution of a pending a summary judgment motion that was ultimately granted. The case was appealed and on March 27, 2006, the circuit issued its mandate vacating the judgment and remanding the case. The defendants did not challenge that ruling and thus ended the discovery stay. Nevertheless, the defendants did not respond to the outstanding discovery request.

The defendants' response to the motion to compel states that "[t]he plaintiff has not, since then, contacted the defendants' counsel with respect to discovery except to serve counsel with a copy of his motion to compel." Docket No. 79 at 1. Nevertheless, since *pro se* parties are not required by N.D. Ind.

L.R. 37.1(c) to initiate an informal conference before filing a motion to compel, this is irrelevant.

The defendants' note that they have not abandoned their affirmative defense of exhaustion and that the court has not set an evidentiary hearing on that issue. Therefore, they argue that the justification for a stay is as valid now as it was when it was entered in 2004. The prior stay unquestionably expired and the defendants haven't sought nor obtained another one. More critically here, a stay is no longer appropriate and there is no basis for an evidentiary hearing on the affirmative defense of exhaustion. The court of appeals has determined that there is a genuine issue of fact as to the exhaustion defense. "[F]ederal policy favor[s] jury decisions of disputed fact questions . . . ." *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958).

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence–if not the command–of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958) (footnote omitted). Therefore, while it is true that the defendants retain their exhaustion affirmative defense (along with any other affirmative defenses that were properly raised) the place for

presenting those defenses is to the jury, and the time for doing so is after the plaintiff has rested his case in chief.

Finally, the defendants ask that the court deny the motion to compel because they are looking for some documents. A voluntary effort to respond to some of the plaintiff's discovery is insufficient. The discovery stay expired on March 27, 2006 and counsel should have responded to the outstanding discovery within 30 days thereafter. Six months have now passed since this discovery was due. The plaintiff is entitled to receive a response to his discovery before proceeding to trial.

For the foregoing reasons, the motion to compel (Docket No. 78) is GRANTED and the defendants are ORDERED to respond to the plaintiff's discovery request (Docket No. 25) on or before December 15, 2006.

SO ORDERED.

ENTERED: November 16 , 2006

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

SIR CHRISTOPHER R. PAVEY,	)	
Plaintiff	)	CAUSE NO.:
vs.	)	
	)	3:03-CV-66 RM
P. CONLEY, *et al.*,	)	
Defendants	)	

ORDER

All of the scheduling deadlines in this case having passed, it is time to set this case for a jury trial. Therefore this court now schedules this case for a **4 day trial by jury** commencing at 9:30 a.m. South Bend time, on **April 2, 2007**. The plaintiff shall be present for the trial with all of his legal paperwork, but inmate witnesses shall testify by videoconferencing if such technology is available.

The court schedules the **final pretrial conference** for 1:00 o'clock p.m. South Bend time on **March 13, 2007**. The final pretrial conference shall be conducted by videoconferencing if such technology is available.

Defense Counsel shall prepare and submit the **proposed final pretrial order** signed by all counsel of record and all unrepresented parties on or before **February 20, 2007**. The plaintiff and defendants shall **file and exchange** their contentions, witness and exhibit lists on or before **January 19, 2007**. If the plaintiff does not file and serve his lists within the time allowed, the court may dismiss the case. The lists must include the names and addresses of any and all witnesses the plaintiff intends to call to testify at the time of trial (regardless of whether subpoenas or orders to produce have been requested for such witnesses), a statement of all the plaintiff's contentions, and a description of any and all exhibits which he may seek to introduce into evidence at the time of trial.

Any motions in limine shall be filed by **February 20, 2007**, together with appropriate memoranda citing points and authorities. The parties may raise as many issues in a motion in limine as the case makes appropriate, but may only file one motion. Oral motions in limine will be allowed only for good cause shown. Motions should identify the evidence at issue with specificity

By **February 20, 2007**, the parties must file any proposed jury instructions (identifying the source and/or supporting authority for each proposed instruction). Any written objections to jury instructions shall be filed by **March 12, 2007**. The court has its own standard instructions on burden of proof, credibility of witnesses and deliberations.

SO ORDERED.

ENTERED: November 16, 2006

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

APPENDIX F

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted February 1, 2006*
Decided March 3, 2006

BEFORE

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

No. 05-2004

CHRISTOPHER R. PAVEY, *Plaintiff-Appellant*	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
vs.	No. 03 C 662

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

P. CONLEY, R. WATTS, GROTT, et al.,
Defendants-Appellees.

Robert L. Miller, Jr.,
Chief Judge

ORDER

Indiana inmate Christopher Pavey brought suit under 42 U.S.C. § 1983. He claimed that six guards used excessive force in violation of the Eighth Amendment when they broke his arm during a cell extraction. The district court granted summary judgment for the guards on the ground that Mr. Pavey had failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). For the reasons set forth in this order, we vacate the judgment of the district court and remand for further proceedings.

Mr. Pavey alleges that six guards at the Maximum Control Facility ("MCF") in Westville, Indiana, broke his arm on October 14, 2001. Mr. Pavey outlined the facts surrounding the incident in his form complaint and attached a "Notice of Tort Claim." *See* R.3. He verified both documents. According to Mr. Pavey, after he argued with Sergeant Conley about recreation and shower privileges, Sergeant Conley summoned a cell extraction team. At approximately 10:00 a.m., five guards in riot gear responded and entered Mr. Pavey's cell along with Sergeant Conley and two other guards designated to observe and videotape the procedure. Mr. Pavey further alleges that once inside, Sergeant Conley and the members of the extraction team beat Mr. Pavey and broke his left arm twice. The nursing staff bandaged Mr. Pavey's arm and gave him pain killers immediately following

the altercation, but not until 4:00 a.m. the next morning did prison staff respond to Mr. Pavey's repeated requests to see a lieutenant or captain. When a lieutenant finally arrived, Mr. Pavey "informed him of the situation" and was told that the lieutenant "would check into it." R.3, Attachment at 11. Five hours later, at approximately 9:00 a.m., Mr. Pavey was transported to another prison where his arm was x-rayed and put in a cast. When he returned to MCF later that day, a major and another lieutenant interviewed him "about the events of the previous day" and photographed his injuries. *Id.* He was then returned to his cell and left there until October 19 when he was transported to a hospital in Indianapolis for surgery. His arm was repaired surgically with a metal plate and six screws. On October 24, he was transferred to Pendleton Correctional Facility. Mr. Pavey says he filed a grievance at Pendleton on January 15, 2002, "when he was able" to write again, but was told that his grievance was too late because it should have been filed at MCF. R.3 at 4.

Mr. Pavey named as defendants a number of MCF employees, including Sergeant Conley and the five members of the extraction team. He claimed that Sergeant Conley and the extraction team used excessive force and that MCF medical staff were deliberately indifferent by failing to treat properly his arm for five days after the break. He also claimed that the beating was retaliation for filing previous grievances and that his due process rights were violated because the guards tasked with observing the cell extraction did not videotape or otherwise document what happened.

At initial screening under 28 U.S.C. § 1915A(a), the district court allowed Mr. Pavey's excessive-force claim to go forward against Sergeant Conley and the members of the extraction team, but dismissed all other claims and defendants. The court reasoned that none of Mr. Pavey's other theories stated a claim for relief. *See* 28 U.S.C. 1915A(b)(1).

Four of the remaining defendants (it appears that the other two never were served properly) later moved for summary judgment on the sole basis that Mr. Pavey had failed to exhaust his administrative remedies as required by § 1997e(a). In support of this argument, the defendants submitted the declaration of an administrative assistant to the MCF grievance officer. The administrative assistant explains in her declaration that inmates generally have 48 hours (excluding weekends and holidays) to submit a grievance. She also states that, if Mr. Pavey had submitted a grievance about the cell extraction, copies would have been in both the grievance officer's file and in his institutional file; she found no relevant grievance in either location, and thus she concluded that none had been submitted at MCF. Finally, she says, "at the least an investigation would have been conducted" had Mr. Pavey submitted a grievance. R.31, Attachment 1 (Declaration of Pam Bane) at 3 ¶ 17.

In response, Mr. Pavey argued that he had exhausted the administrative remedies available to him. He maintained that he could not submit a written grievance until January 15, 2002, because he is left-handed and was unable to write with his injured arm. He filed a grievance at Pendleton, he

said, as soon as he was able to write again. Moreover, Mr. Pavey explained, he verbally complained, which led to an investigation the day after the incident during which the major and lieutenant interviewed him and took photographs of his injuries. Mr. Pavey noted that he served the defendants with a discovery demand for their records of this investigation but was thwarted when the district court granted the defendants' motion to stay discovery pending resolution of their motion for summary judgment.[1]

The defendants replied to Mr. Pavey's response, attaching the declaration of the MCF grievance officer. She asserts in her declaration that Mr. Pavey's broken arm would not have prevented him from filing a timely grievance at MCF. This is so, according to the grievance officer, because Procedure 00-02-301, section XIV, of the Indiana Department of Correction Administrative Procedures permits inmates to obtain assistance in writing complaints from other inmates or staff members. That provision states:

> The complaint must be submitted by the offender on his/her own behalf. One offender may not submit a complaint on behalf of another offender nor are "class action" complaints acceptable. However, staff or another offender may assist an offender who

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[1] Two days before the deadline for the defendants to respond to Mr. Pavey's document request, they moved to stay discovery pending a decision on their motion for summary judgment. The district court granted the requested stay, reasoning that none of the documents Mr. Pavey sought in discovery were relevant to whether he had exhausted his administrative remedies.

> cannot write a complaint/grievance/appeal him/herself by writing the complaint/grievance/appeal for the offender. The complaint shall explain how the situation or incident affects the offender personally.

That same section also states: "All complaints, grievances and appeals shall be signed and dated by the offender. Signatures may be waived when the offender has transferred, does not know how to write, or is physically unable to write either by restraint or infirmity (disability)." In addition to arguing that Mr. Pavey's broken arm did not render the grievance process unavailable, the defendants also attacked Mr. Pavey's assertion that he satisfactorily grieved the cell extraction because his verbal complaints led to an investigation. The defendants argued that even if Mr. Pavey "gain[ed] the attention of people who would have reviewed a grievance if he'd grieved, and [got] a result similar to what he feels he might have gotten if he grieved," the exhaustion requirement demanded that he specifically follow the grievance procedures in place at MCF, which meant filing a written grievance. R.41 at 5. The defendants said nothing about the alleged investigation; they neither denied that it took place or explained what may have prompted prison officials to question Mr. Pavey.

The district court granted summary judgment in favor of all six guards. Although "[t]aking as true all of the facts given" by Mr. Pavey, the court accepted the defendants' reasoning and held that Mr. Pavey had failed to exhaust the grievance process and that his inability to write did not excuse that omission. R.42 at 5. Mr. Pavey challenges only this ruling on appeal and does not contest the § 1915A

dismissal of his other claims. He essentially restates his position at summary judgment: He could not write because of his broken arm, so he grieved to "anyone who would listen" and wrote a complaint as soon as he could in January 2002.[2] Appellant's Br. at 5.

We review the application of § 1997e(a) de novo. *Conyers v. Abitz*, 416 F.3d 580, 584 (7th Cir. 2005). We have held that "[t]o exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002). Lack of exhaustion, however, is an affirmative defense that a defendant has the burden of proving. *Brengettcy v. Horton*, 423 F.3d 674, 682 (7th Cir. 2005); *Dale v. Lappin*, 376 F.3d 652, 655 (7th Cir. 2004) (per curiam). And where the record establishes disputed issues of fact on the question, that burden has not been met. *See Curtis*

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[2] Because in his brief Mr. Pavey discusses only the dismissal of his excessive force claim, he has waived any contention that the district court erred in holding that his complaint does not also state claims for retaliation, for a denial of due process in connection with the failure to videotape adequately and document the cell extraction, and for deliberate indifference to the injuries he sustained. *See Hentosh v. Herman M. Finch Univ. of Health Scis./The Chicago Med. Sch.*, 167 F.3d 1170, 1173 (7th Cir. 1999) (arguments not raised in opening brief are waived); *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 699-700 (7th Cir. 1995) (pro se appellants are subject to the same waiver rules as represented parties). Accordingly, we have no occasion to assess the propriety of the district court's dismissal of these other claims at the screening stage. Nor do we consider whether Mr. Pavey's argument that he exhausted his excessive-force claim applies to his other claims.

v. Timberlake, No. 05-1239, 2005 WL 3728794, at *2 (7th Cir. Jan. 27, 2006); *Dale*, 376 F.3d at 656. We conclude that this is such a case.

Like the district court, we accept Mr. Pavey's declarations as true at this stage of the case. Mr. Pavey's evidence establishes that, within 48 hours of his injury, he verbally complained, first to a lieutenant who promised to investigate, and second to a major and another lieutenant who summoned Mr. Pavey, questioned him about the episode and photographed his injuries. The grievance procedure cited by the defendants specifically allows inmates who cannot write to get another inmate *or* a staff member to assist them in preparing grievances. The procedure does not require that the inmate sign his grievance. Therefore, if the major or the lieutenants memorialized Mr. Pavey's complaint in writing and passed it along for investigation, Mr. Pavey may well have done all that literally was necessary to comply with the grievance procedure.

The defendants never have denied that the incident was investigated, and at summary judgment they remained silent as to what transpired during the investigation and what prompted it. Neither have the defendants ever asserted—and certainly they offered no evidence—that Mr. Pavey's complaints to the major and lieutenants were not reduced to writing. Instead, the defendants opposed Mr. Pavey's efforts to obtain discovery of records documenting their investigation of his allegations. Now they offer the unsatisfactory argument that Mr. Pavey's complaints could not have met the exhaustion requirement of § 1997e(a) because, even if he "gain[ed] the attention of people who would

have reviewed a grievance" and prompted exactly the same investigation that a grievance would have generated, he still did not put his complaint in writing. R.41 at 5. This contention misses the point. Mr. Pavey's inability to write during the allotted two days was undisputed, as was his declaration that he was locked in his cell for that entire period except when he was receiving medical care or was with the major or lieutenants complaining about the very events underlying this lawsuit. If there was to be a written grievance, then it had to be written for Mr. Pavey by the officers who interviewed him. He did not have to write it himself; he did not have to review it; and he did not have to sign it. Thus, as Mr. Pavey suggests, there may be a writing that would qualify as a grievance in the documents he demanded but never obtained during discovery, and the defendants have yet to explain why his oral account of the cell extraction, as memorialized by the officers who interviewed him, would not literally satisfy section XIV of Procedure 00-02-301. Having left these questions unresolved, the defendants did not meet their burden of establishing the absence of a material dispute concerning their affirmative defense of failure to exhaust.

Moreover, even if the MCF officers did not produce a grievance on Mr. Pavey's behalf by writing down his account of the cell extraction, there still remains the question whether Mr. Pavey reasonably believed that he had done all that was necessary to comply with Procedure 00-02-301. We have held that inmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies. *See Curtis*, 2005 WL 3728794, at *3. In

Curtis the defendant jail guards argued that the plaintiff inmate had failed to exhaust his administrative remedies because he hand delivered a grievance to a jail employee instead of placing it in a lockbox designated for that purpose. In overturning the grant of summary judgment for the defendants, we observed that the defendants had offered no evidence to dispute the inmate's testimony that hand-delivery was an encouraged alternative to use of the lockbox. As we explained, prison officials who "encourage, or even invite, noncompliance with written procedure" cannot then turn around and use the deviation as evidence of a failure to exhaust. *Id.* In reaching this conclusion, we joined other circuits which have held that prison officials will be bound by their oral representations to inmates concerning compliance with the grievance process. *See Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005) (stating that information prison officials provided to prisoner about grievance procedures was relevant in deciding whether available administrative remedies had been exhausted); *Brown v. Croak*, 312 F.3d 109, 112 (3d Cir. 2002) (holding that prisoner's noncompliance with written grievance procedures did not constitute a failure to exhaust since prison officials had told him that written procedures were not accurate). Mr. Pavey's situation is similar; even if the MCF officers did not generate what *they* meant to be a grievance that satisfied section XIV of Procedure 00-01-003, they still did not establish that Mr. Pavey, who could not write his own grievance and did not have access to help from his fellow inmates, did not reasonably rely on the assurance that his excessive-force allegations would be investigated.

We make one final observation. Section 1997e(a) may prove to be irrelevant if further development of the record shows that prison officials rendered the established grievance procedures unavailable to Mr. Pavey by lending him no assistance in creating what would qualify as a written grievance while at the same time isolating him from other inmates who might have assisted him. Mr. Pavey always has insisted--and the defendants never have denied--that he was confined to his cell in pain continuously for several days after his arm was broken except when he was taken for medical treatment or was in the presence of the major or two lieutenants. If so, then he lacked access to other inmates who might have written a grievance for him. We have stated that, when inmates cannot comply with grievance procedure without essential help from prison officials and that assistance is withheld, the failure of the officials to facilitate the grievance process effectively renders administrative remedies unavailable. *See Dale*, 376 F.3d at 656 (vacating grant of summary judgment for defendants on failure-to-exhaust defense where inmate submitted evidence that prison officials failed to respond to his requests for required grievance forms); *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (holding that administrative remedies are unavailable if prison officials fail to respond to prisoners' grievances); *see also Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004) (holding that defendants are "estopped from raising non-exhaustion as an affirmative defense when prison officials inhibit an inmate's ability to utilize grievance procedures"); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (holding that district court erred in dismissing inmate's complaint for failure to

exhaust administrative remedies when court did not address inmate's allegation that prison officials failed to provide necessary grievance forms); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (explaining that grievance process "is not an 'available' remedy under § 1997e(a)" if prison officials prevent its use). The defendants, therefore, have not established on this record that Mr. Pavey had an available administrative remedy during the relevant period.

Because the defendants did not establish the absence of material issues of fact concerning the exhaustion question, we conclude that it was error to grant summary judgment in their favor. Accordingly, the judgment is vacated, and the case is remanded for further proceedings on Mr. Pavey's excessive-force claim.

VACATED; REMANDED

APPENDIX G

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 12, 2008
Before
Hon. Richard A. Posner, *Circuit Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*

No. 07-1426

CHRISTOPHER R. PAVEY,
Plaintiff-Appellee,
v.
PATRICK CONLEY, ROBERT WATTS, LAURENCE GROTT, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 03 C 662
Robert L. Miller, Jr., *Chief Judge*.

ORDER

On July 21, 2008, plaintiff-appellee filed a petition for rehearing with suggestion for rehearing en banc, and on August 13, 2008, defendants-appellants filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has requested a vote on the petition for rehearing en banc. The petition is therefore **DENIED**.

120

(2)

Supreme Court, U.S.
FILED
FEB 16 2009
OFFICE OF THE CLERK

No. 08-886

IN THE

Supreme Court of the United States

CHRISTOPHER PAVEY,

Petitioner,

v.

PATRICK CONLEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255

**Counsel of Record*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
JAMES E. PORTER
Deputy Attorneys General

Counsel for Respondents

QUESTION PRESENTED

In a civil rights case brought by a prisoner and subject to the Prison Litigation Reform Act, 42 U.S.C. § 1997e ("PLRA"), is the affirmative defense of failure to exhaust administrative remedies a threshold matter that may be resolved by the judge before the presentation of any other evidence at trial?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. There is No "Disarray" in the Lower Courts Regarding Procedures for Adjudicating the PLRA Exhaustion Defense 4

II. There is No Conflict Between the Decision Below and *Jones v. Bock* or Other Precedents Governing Adjudication of Affirmative Defenses Generally 6

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

American Dredging Co. v. Miller,
510 U.S. 443 (1994) 9

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 9

Beacon Theatres, Inc. v. Westover,
359 U.S. 500 (1959) 12

Brownwell v. Krom,
446 F.3d 305 (2d Cir. 2006) 5

Bryant v. Rich,
530 F.3d 1368 (11th Cir. 2008) 4

Byrd v. Blue Ridge Rural Elec. Coop., Inc.,
356 U.S. 525 (1958) 9

Curtis v. Loether,
415 U.S. 189 (1974) 12

Dairy Queen, Inc. v. Wood,
369 U.S. 469 (1962) 12

Delany v. Padgett,
193 F.2d 806 (5th Cir. 1952) 11

Fields v. Okla. State Penitentiary,
511 F.3d 1109 (10th Cir. 2007) 5

Foulk v. Charrier,
262 F.3d 687 (8th Cir. 2001) 5

CASES (CONT'D)

Hinojosa v. Johnson,
277 F. App'x 370 (5th Cir. 2008) 5

Jones v. Bock,
549 U.S. 199 (2007) ..... *passim*

Kaplan v. Exxon Corp.,
126 F.3d 221 (3d Cir. 1997) 10

Nieman v. NLO, Inc.,
108 F.3d 1546 (6th Cir. 1997) 11

Pearson v. Callahan,
129 S. Ct. 808 (2009) 10

Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio,
261 F.3d 542 (5th Cir. 2001) 10

Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.,
549 U.S. 422 (2007) 11

U.S. v. Duncan,
850 F.2d 1104 (6th Cir. 1988) 10

Vermont Agency of Natural Resources v. U.S. ex rel. Stevens,
529 U.S. 765 (2000) 11

Williams v. Beard,
482 F.3d 637 (3d Cir. 2007) 5

Woodford v. Ngo,
548 U.S. 81 (2006) 10, 11

CASES (CONT'D)

Wyatt v. Terhune,
315 F.3d 1108 (9th Cir. 2003) 4

STATUTES

28 U.S.C. § 1292(b) 2

42 U.S.C. § 1983 ..... 1, 2

42 U.S.C. § 1997e 1

RULES

Fed. R. Civ. P. 12(b) 4

Fed. R. Civ. P. 38(a) 8

STATEMENT OF THE CASE

Petitioner Christopher Pavey, a state prisoner, brought this action pursuant to 42 U.S.C. § 1983 against several current or former officers employed by the Indiana Department of Correction ("DOC"). Pet. App. 25a. Pavey claimed that six guards at the Maximum Control Facility in Westville, Indiana, used excessive force in violation of the Eighth Amendment when they broke his arm during a cell extraction on October 14, 2001. Pet. App. 25a.

The Defendants moved for summary judgment, claiming that Pavey failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e, because he did not file a timely grievance with the prison authorities. Pet. App. 2a. Pavey responded that due to his injury, he was physically unable to prepare a written grievance until January 15, 2002. Pet. App. 2a, 26a. By that time, he had been transferred to the Pendleton Correctional Facility. Pet. App. 26a. Pavey claimed that he attempted to file a grievance at Pendleton on January 15, but was told the grievance was untimely, as it should have been filed at the Westville facility. Pet. App. 26a.

The district court granted summary judgment in favor of the Defendants, holding that Pavey had failed to exhaust his administrative remedies and that his inability to write did not excuse him from properly utilizing the grievance process. Pet. App. 29a. The Seventh Circuit reversed, however, finding that the record reflected genuine issues of material

fact concerning the exhaustion question. Pet. App. 35a.

Upon remand to the district court, Pavey sought and was granted the right to a jury trial on his Section 1983 damages claims. Pet. App. 21a. In a discovery order, the district court provided that the Defendants would present evidence as to the exhaustion issue to the jury after Pavey had rested his case in chief on the merits of his claim. Pet. App. 19a-20a. The Defendants moved the court to reconsider, arguing that exhaustion should be tried to the court, separately and without a jury, before the parties addressed the merits of Pavey's constitutional claim. Pet. App. 16a. The district court denied the motion, stating that "[t]he time for presenting affirmative defenses to the jury is no different in this case than it is in any other: after the plaintiff has rested his case in chief." Pet. App. 16a.

Upon the Defendants' motion, however, the district court certified this series of orders for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 8a-11a. The Seventh Circuit reversed the district court's orders and held that in cases in which exhaustion is contested, the district court judge—not the jury—must resolve genuine disputed facts about exhaustion in a preliminary hearing before the case proceeds to the merits. Pet. App. 6a. Noting that "not every factual issue that arises in the course of a litigation is triable to a jury as a matter of right," the court reasoned that "juries do not decide what forum a dispute is to be resolved in," but rather, they "decide cases, not issues of judicial traffic control." Pet. App. 3a-4a. The court went on to state that "trying the merits before exhaustion . . . is

unsatisfactory . . . because it would thwart Congress's effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies." Pet. App. 5a.

The court set forth a simple, commonsense sequence to be followed in cases where exhaustion is contested, beginning with limited discovery and, if necessary, a hearing on exhaustion. Pet. App. 6a. If the judge finds that the prisoner has exhausted his administrative remedies or that no such remedies were available, the case proceeds to discovery and resolution of the merits. Pet. App. 6a. If, on the other hand, the judge finds that the prisoner failed to exhaust available administrative remedies, the course of litigation depends on the cause of that failure. If the failure was innocent (as where prison officials prevent a prisoner from exhausting his remedies), then the prisoner is permitted to go back and exhaust. Pet. App. 6a. But, if the judge finds that the failure to exhaust was the prisoner's fault, the case is over. Pet. App. 6a.

Pavey filed a petition for rehearing with a suggestion of rehearing en banc. The court denied the petition, but amended its earlier opinion to permit limited discovery on factual issues relating to both exhaustion and the merits of the claim. Pet. App. 7a, 36a. On remand, the district court referred the case to a magistrate judge for an evidentiary hearing on exhaustion, but stayed the proceedings pending Pavey's promised petition for review by this Court.

REASONS FOR DENYING THE PETITION

I. There is No "Disarray" in the Lower Courts Regarding Procedures for Adjudicating the PLRA Exhaustion Defense

Pavey writes of the supposed need to resolve "widespread conflict and uncertainty in the federal courts over the proper procedure for adjudicating the PLRA exhaustion defense." Pet. 26. There is no lower-court conflict justifying review, however.

Only two other circuits have addressed whether a judge or jury should decide exhaustion-related facts, and both have, like the Seventh Circuit, held that courts, not juries, should do so as a threshold matter prior to adjudication of the merits. In both *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008), and *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), the courts held that exhaustion should be raised as an unenumerated Rule 12(b) motion, and that factual disputes should be resolved in that context by courts rather than juries. To be sure, the decision below rejected the Rule 12(b) procedural mechanism, Pet. App. 3a, but given that the outcome is the same (*i.e.*, exhaustion facts are decided by judges, not juries), that formalistic dispute hardly warrants intervention by this Court.

None of the remaining five cases cited by Pavey to illustrate "disarray" among the circuits discusses the proper method for resolving exhaustion-related factual disputes under the PLRA. Actually, in four, there were *no* disputed factual issues relating to exhaustion. The only exhaustion issues were

whether a grievance filed by the prisoner was legally sufficient and, if not, whether the insufficiency was excusable. *See Hinojosa v. Johnson*, 277 F. App'x 370, 380 (5th Cir. 2008) (reversing grant of summary judgment in favor of certain defendants where grievance was not made part of the record on appeal, and remanding for district court to determine whether the grievance provided the defendants a fair opportunity to address the problems that later formed the basis of the prisoner's Section 1983 claim); *Williams v. Beard*, 482 F.3d 637, 639 (3d Cir. 2007) (reversing summary judgment in favor of the defendant where the prisoner procedurally defaulted by failing to name the defendant in his initial grievance, but where such default was found by the court to be excusable); *Fields v. Okla. State Penitentiary*, 511 F.3d 1109 (10th Cir. 2007) (affirming summary judgment in favor of the defendants where the defendants' summary judgment brief pointed out various shortcomings in the prisoner's grievance filings and the prisoner failed to respond to these shortcomings in his response brief); *Brownwell v. Krom*, 446 F.3d 305, 311, 313 (2d Cir. 2006) (reversing the district court's grant of summary judgment in favor of the defendant officers where the prisoner's grievance "did not sufficiently allege intentional misconduct," but special circumstances nonetheless justified the prisoner's failure to exhaust).

Nor is the fifth case cited by Pavey, *Foulk v. Charrier*, 262 F.3d 687 (8th Cir. 2001), instructive. In that case, the defendants unsuccessfully raised the exhaustion defense for the first time during trial in an oral motion to dismiss. *Id.* at 697. Its holding says nothing about how the defense is to be handled

when raised prior to trial, so there is no reason to believe Pavey's case would have been resolved differently in the Eighth Circuit.

In short, none of Pavey's "disarray" cases precludes judges from resolving factual disputes related to the PLRA exhaustion defense. Indeed, the only three circuits to have addressed the issue have endorsed the procedure. There is simply no PLRA exhaustion issue warranting the Court's review.

II. There is No Conflict Between the Decision Below and *Jones v. Bock* or Other Precedents Governing Adjudication of Affirmative Defenses Generally

Unable to demonstrate a PLRA-specific conflict, Pavey alternatively suggests that there is a conflict between the Seventh Circuit's holding and both *Jones v. Bock*, 549 U.S. 199 (2007), and holdings of lower federal courts governing treatment of affirmative defenses generally. By asserting that the decision below stands in conflict with *Jones* and cases sending affirmative defenses to juries, however, Pavey is essentially asking the Court to review whether, under the Seventh Amendment, all affirmative defenses are created equal and must be decided by a jury. Not only is that issue far broader than the question presented, but Pavey does not demonstrate any serious need for it to be addressed. When assessing whether to send an issue to a jury, courts typically do not peg their decisions to whether the issue is technically part of an affirmative defense. Instead, they look to other, more precise factors, such as whether the issue needs to be

decided as a threshold matter or whether instead it logically can be decided with the merits.

In short, Pavey's case for certiorari presumes that all affirmative defenses should be treated the same. Without a conclusive demonstration as to why that should be the case, however, there is no basis from which to argue that lower courts are in "conflict" over how to handle affirmative defenses generally, and no justification for review by this Court.

1. Pavey suggests that the opinion below conflicts with the Court's recent holding in *Jones v. Bock*, 549 U.S. 199 (2007), that the PLRA's requirement that prisoners exhaust administrative remedies before coming to federal court constitutes an affirmative defense. *See* Pet. i, 14-15. The Court in *Jones* predicated its holding on the notion that, absent congressional directive, courts should not depart from the "usual" procedural practices outlined in the Federal Rules of Civil Procedure. *Jones*, 549 U.S. at 212. Pavey essentially argues that, by allowing the exhaustion defense to be decided by a judge rather than a jury, the Seventh Circuit has departed from the "usual practice" governing affirmative defenses and has therefore ignored *Jones*. Pet. 14-15. This argument stretches *Jones* well beyond its limits and insupportably assumes that all affirmative defenses must be treated the same.

In *Jones*, the relevant "usual practice under the Federal Rules" was that exhaustion must typically be raised as an affirmative defense—a practice directly at odds with a rule imposing a non-textual burden on plaintiffs to plead and prove exhaustion.

Jones, 549 U.S. at 212. Such allocation of the burdens of pleading and proof, however, says nothing about when and by whom relevant facts are to be decided. There is nothing inherent in the notion of "affirmative defense" that demands *jury* resolution of disputed facts.

Indeed, unlike in *Jones*, there is no "usual practice under the Federal Rules" directing that affirmative defenses be resolved by juries. Rule 38, which provides for jury trials, refers only to "[t]he right of trial by jury as declared by the Seventh Amendment . . . or as provided by a federal statute." Fed. R. Civ. P. 38(a). Accordingly, any "usual practice under the Federal Rules" with regard to trying affirmative defenses turns on the reach of the Seventh Amendment (and federal statutes affording jury trials). Without such a link, there is no "usual practice" of the sort invoked in *Jones* that has been thwarted by the decision below.

2. This case, however, has never really been a Seventh Amendment case. The Seventh Amendment was never a focal point below (*See* Appellee's Br. at 6), and the question that Pavey presents to this Court does not frame a Seventh Amendment issue. Pavey does invoke the Seventh Amendment in Part I.B. of the Petition, but he makes no attempt to explain how affirmative defenses must by nature be subject to jury trials under the Seventh Amendment.

This is significant because PLRA exhaustion is not unique as a non-jurisdictional procedural threshold affirmative defense subject to judicial factfinding. As the decision below recognized, factual disputes concerning venue are decided as a threshold

matter by judges, not juries. Pavey dismisses the Seventh Circuit's analogy of exhaustion to venue, citing *American Dredging Co. v. Miller,* 510 U.S. 443 (1994), for the observation that venue does not go to a plaintiff's substantive right to recover. *See id.* at 454. But as a procedural defense, exhaustion is no more an "essential element of a claim for relief," *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006), and no more "bears directly upon a prisoner's right to recover," Pet. 21, than venue. Indeed, exhaustion is essentially a subcategory of venue, requiring the court to answer the question, "has the plaintiff brought the claim to the right place?"

Accordingly, any attempt to suggest the decision below conflicts with cases putting other types of affirmative defenses in the hands of juries requires a rich and detailed comparative analysis, which Pavey does not provide. Pavey does, indeed, cite a bevy of cases directing that a wide variety of affirmative defenses be tried by juries. However, none of those cases suggests that affirmative defenses generally must be tried to juries as a matter of Seventh Amendment doctrine. In fact, *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 n.10 (1958), expressly disclaims such analysis: "Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action."

Rather, the cases cited by Pavey stand only for the unremarkable proposition that sometimes it is

appropriate for a jury to consider certain affirmative defenses, particularly where those affirmative defenses go directly to the merits of the case. *See, e.g., Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 547-48 (5th Cir. 2001) (in Title VII equal pay case, defendant university raised affirmative defenses explaining the wage differential at issue); *Kaplan v. Exxon Corp.*, 126 F.3d 221, 223 (3d Cir. 1997) (in "slip and fall" negligence case, defendant raised affirmative defense of assumption of risk claiming that plaintiff willingly walked across snowbank, thus causing her fall); *U.S. v. Duncan*, 850 F.2d 1104, 1105, 1115 (6th Cir. 1988) (defendant charged with making and preparing a tax return containing a false statement raised affirmative defense of reliance upon advice of counsel, claiming he relied in good faith on the advice of his certified public accountant).

Pavey specifically compares PLRA exhaustion with statute of limitations defenses. Pet. 18. But, as with other affirmative defenses, there is no obvious reason why exhaustion and limitations defenses must be decided using the same procedures. Even though not a *jurisdictional* issue, *Woodford v. Ngo*, 548 U.S. 81, 101 (2006), PLRA exhaustion is nonetheless a *threshold* issue that warrants treatment analogous to jurisdictional issues.[1] In

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[1] The decision below does not conflict with *Woodford*'s conclusion that the PLRA allows "a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies." *Woodford*, 548 U.S. 81, 101 (2006). As the Court recently reinforced in *Pearson v. Callahan*, 129 S. Ct. 808, 817 (2009), such

contrast, a statute of limitations defense is not by its nature a threshold issue, and in many cases merely limits the measure of damages. *See Nieman v. NLO, Inc.*, 108 F.3d 1546, 1559 (6th Cir. 1997).

Even where a limitations defense would, if successful, preclude all liability, the defendant receives full protection even if the limitations period is decided by a jury at trial. *See Delany v. Padgett*, 193 F.2d 806, 811 (5th Cir. 1952). The same is not true for PLRA exhaustion, which is intended to prevent premature lawsuits from going to trial *at all*. *Jones*, 549 U.S. at 202. In fact, as the court observed below, there is much greater potential for successive jury trials—with their attendant costs—for PLRA exhaustion issues than for limitations defenses. With PLRA exhaustion issues, "one could envision a series of jury trials before there was a trial on the merits: a jury trial to decide exhaustion, a verdict finding that the prisoner had failed to exhaust, an administrative proceeding, the resumption of the

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"order of battle" determinations are fairly predicated on case-specific circumstances. There are many circumstances where it is far easier to determine that the complaint fails to state a claim than it is to determine a legitimate threshold issue—even a jurisdictional issue—and the Court's precedents generally allow for that. *See Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 778-80 (2000); *Sinochem Int'l. Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). In the PLRA context, threshold dismissal of a "plainly meritless claim" is very different from full adjudication of a colorable claim on the merits prior to review of exhaustion. The PLRA mandates that exhaustion must be considered prior to the merits of a claim, and the Court's opinion in *Woodford* supports that mandate.

litigation, and another jury trial on failure to exhaust." Pet. App. 4a. In contrast, if a plaintiff fails to bring an action within the limitations period, the litigation is over, not merely "shunt[ed] . . . to another forum." Pet. App. 4a-5a. Accordingly, there is no basis for presuming that these two defenses should be subject to the same trial procedures.

3. Pavey separately relies on *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and *Curtis v. Loether*, 415 U.S. 189 (1974), for the principle that factual issues that overlap between jury and non-jury issues must be presented to a jury. But the Seventh Circuit accounted for these cases when it stated that "any finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if—and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits." Pet. App. 5a. This pragmatic approach effectively permits courts both to vindicate Congress' effort to bar trials of prisoner cases where the prisoner has failed to exhaust his administrative remedies and to afford jury trials on disputed fact issues going to the merits. These competing interests were not at stake in the lower-court cases cited by Pavey, *see* Pet. 23, so the decision below cannot reasonably be cast in conflict with them.

* * * *

The Court decided *Jones v. Bock* barely two years ago. Even if procedures for resolving PLRA exhaustion defenses may eventually warrant further review by this Court, it is far too early to take

another case on the subject. Especially given that the only three circuits to address the matter have agreed that judges are permitted to resolve factual disputes bearing on exhaustion, the Court should allow other circuits more time to consider the issue. That way the Court may, if ultimately it becomes necessary to explicate further procedures for resolving PLRA exhaustion defenses, have greater national input by judges who routinely engage the practical "traffic control" issues at stake.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
JAMES E. PORTER
Deputy Attorneys General

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*

Counsel for Respondents

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121

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No. 08-886

IN THE

Supreme Court of the United States

CHRISTOPHER PAVEY,
Petitioner,

v.

PATRICK CONLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

DAVID M. FRIEBUS
53 W. Jackson Blvd.
Suite 750
Chicago, Illinois 60604
(312) 404-5068

JONATHAN D. HACKER
(*Counsel of Record*)
JUSTIN FLORENCE*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted only in Massachusetts*

WALTER DELLINGER**
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE
CLINIC

***May be contacted at O'Melveny & Myers LLP*

Attorneys for Petitioners

TABLE OF CONTENTS

Page

REPLY BRIEF FOR THE PETITIONER 1

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006).....5
Baris v. Sulpicio Lines, Inc.,
74 F.3d 567 (5th Cir. 1996).....4
Bartholomew v. Va. Chiropractors Ass'n,
612 F.2d 812 (4th Cir. 1979).....3
Burnett v. New York C. R. Co.,
380 U.S. 424 (1965).....4
Chess v. Pindelski,
2009 WL 174992 (N.D. Ill. Jan. 23, 2009).....11
City of Monterey v. Del Monte Dunes, Ltd.,
526 U.S. 687 (1999).....3
Davis v. Streekstra,
227 F.3d 759 (7th Cir. 2000).....5
Drippe v. Gototweski,
2008 WL 4919401 (M.D. Pa. Nov. 17, 2008).....11
Gilmore v. Stalder,
2008 WL 4155332 (W.D. La. Sept. 8, 2008).....9
Hatch v. Cravens,
2008 WL 2952355 (S.D. Ill. July 30, 2008).....10
Jazzabi v. Allstate Ins. Co.,
278 F.3d 979 (9th Cir. 2002).....2
Jones v. Bock
549 U.S. 199 (2007).....1, 5
Mendoza v. Ring,
2008 WL 2959848 (C.D. Ill. July 30, 2008).....12
Piggie v. Robertson,
2009 WL 198004 (N.D. Ind. Jan. 23, 2009).....11
Robinson v. Metro-North Commuter R.R.,
267 F.3d 147 (2d Cir. 2001).....3

Singleton v. Johnson,
2008 WL 3887633 (S.D. Ga. Aug. 18, 2008).....9
Snipes v. Witthrop,
2008 WL 2952359 (S.D. Ill. July 30, 2008).....10
Woodford v. Ngo,
548 U.S. 81 (2006).....4

STATUTES

28 U.S.C. § 1406.....4
Fed. R. Civ. P. 8.....2
Fed. R. Civ. P. 12.....2
Fed. R. Civ. P. 56.....2

OTHER AUTHORITIES

5 Charles Alan Wright & Arthur R. Miller,
Federal Practice and Procedure § 1277 (3d
ed. 1998).....3
5C Charles Alan Wright & Arthur R. Miller,
Federal Practice and Procedure § 1373 (3d
ed. 1998).....2
14D Charles Alan Wright, Arthur R. Miller
& Edward H. Cooper, Federal Practice and
Procedure § 3826 (3d ed. 1998).....4
18A Charles Alan Wright, Arthur R. Miller
& Edward H. Cooper, Federal Practice and
Procedure § 4436 (3d ed. 1998).....4

REPLY BRIEF FOR THE PETITIONER

The petition presents the question whether the exhaustion affirmative defense under the Prison Litigation Reform Act ("PLRA") must be litigated under the usual practice for affirmative defenses or pursuant to a novel procedure conceived from whole cloth by the court of appeals. Respondents mischaracterize the holding below in an attempt to minimize the conflict between that decision and numerous precedents of this and other courts. The court of appeals did not hold simply that a district court "may," or is "permitted to," resolve the PLRA exhaustion affirmative defense before addressing the merits of the plaintiff's claim and other affirmative defenses. *See* Br. Opp. i, 13. Rather, the Seventh Circuit held that the district court *must* do so every time exhaustion is contested—even when, as here, there are genuine factual disputes common to both the affirmative defense and claim itself—and that the court must do so before the rest of the litigation may proceed. In so doing, the Seventh Circuit invented a novel procedure, unmoored from usual practice under the Federal Rules of Civil Procedure. The judgment below conflicts with numerous precedents governing the adjudication of affirmative defenses and exacerbates a widening conflict in the lower courts, meriting this Court's review, if not summary reversal.

A. The decision below conflicts with this Court's decision in *Jones v. Bock*, 549 U.S. 199, 213-16 (2007), and precedents governing the adjudication of affirmative defenses under the Federal Rules and the Seventh Amendment. Those precedents establish that the PLRA exhaustion requirement is an af-

firmative defense. And they establish the usual procedure for resolving affirmative defenses.

1. Respondents acknowledge that PLRA exhaustion is an affirmative defense, and they agree that *Jones* mandates that "absent congressional directive, courts should not depart from the 'usual' procedural practices outlined in the Federal Rules of Civil Procedure." Br. Opp. 7. The crux of respondents' opposition is that there is no conflict between the decision below and *Jones* because there is no "usual practice" when it comes to adjudicating a statutory affirmative defense to a § 1983 suit for damages, like the affirmative defense of failure to exhaust in this case. Br. Opp. 8.

Respondents are incorrect. As a procedural matter, the Federal Rules provide a roadmap for the adjudication of affirmative defenses—notably, one that does *not* include resolution by preliminary hearing. Pet. 21; *see also* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1373 (3d 1998). As *Jones* observes, affirmative defenses should be raised by a defendant in an answer. Fed. R. Civ. P. 8(c). To adjudicate the defense based on matters outside the pleadings (such as documents or testimony), such evidence must be presented "in a motion for summary judgment," *id.* 12(d), which can be granted only if "there is no genuine issue as to any material fact," *id.* 56(c). But if, as in this case, there are genuine factual disputes about an affirmative defense, they must be resolved though trial just like any other factually disputed element of a claim. *See Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 984 (9th Cir. 2002) ("[E]lements and affirmative defenses

are co-equal components of the jury's liability determination"); 5 Wright & Miller, *supra*, § 1277.

As a substantive matter, the right to a jury trial on an affirmative defense is not, as respondents assert, determined simply by "whether the issue needs to be decided as a threshold matter or whether instead it logically can be decided with the merits." Br. Opp. 6-7. Instead, the jury right is driven generally by the nature of relief sought by the underlying claim. *See City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 726 n.1 (1999) (Scalia, J., concurring). And, as demonstrated in the petition, "once the right to a jury trial attaches to a claim, it extends to all factual issues necessary to resolving that claim." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 170 (2d Cir. 2001); *see* Pet. 16-17. Thus, because petitioner invoked his Seventh Amendment right to a jury trial on his § 1983 claim, the "usual practice" calls for the jury to decide any genuine factual disputes involved in the exhaustion affirmative defense as well.

2. Respondents cannot identify any legal affirmative defenses that depart from this usual practice and require, as the decision below does, the judge to resolve the affirmative defense before litigation on the merits may proceed. Instead they assert that PLRA exhaustion "is essentially a subcategory of venue." Br. Opp. 9. But venue is not an "affirmative defense"; instead, venue must be established by a plaintiff, rather than pleaded and proven by a defendant. *See, e.g.*, *Bartholomew v. Va. Chiropractors Ass'n*, 612 F.2d 812, 816 (4th Cir. 1979); 14D Wright & Miller, *supra*, § 3826.

Respondents' characterization of PLRA exhaustion as a category of venue is flawed for another reason. Under the procedure concocted by the court of appeals, if a judge resolves disputed facts about PLRA exhaustion against the plaintiff, then "the case is over." Pet. App. 6a. If exhaustion were simply a matter of venue, however, then the case could never be "over" on this basis. Dismissal for improper venue is not "an adjudication upon the merits," 18A Wright & Miller, *supra*, § 4436, and so does not "preclude a party from later litigating the same claim," *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 571 (5th Cir. 1996); *see also* 28 U.S.C. § 1406(a); *Burnett v. New York C. R. Co.*, 380 U.S. 424, 430 (1965) (observing that transfer prevents "the unfairness of barring a plaintiff's action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run").

3. Respondents also contend that PLRA exhaustion "warrants treatment analogous to jurisdictional issues." Br. Opp. 10. This Court, however, has expressly held that PLRA exhaustion is "not jurisdictional," *Woodford v. Ngo*, 548 U.S. 81, 101 (2006), as even respondents are forced to concede, Br. Opp. 10.

The analogy to jurisdiction is flawed for reasons beyond inconsistency with *Woodford*. First, if PLRA exhaustion were similar to jurisdiction, then, as with venue, the burden would be on the plaintiff to affirmatively plead and prove the issue, which is inconsistent with *Jones*. Second, whereas federal courts are permitted to find facts to assure themselves of jurisdiction over a dispute, *Arbaugh v. Y &*

H Corp., 546 U.S. 500, 514 (2006), no such authority exists with respect to legal affirmative defenses.

4. Indeed, respondents apparently agree that the legal affirmative defense of a statute of limitations must be resolved by the jury when genuine factual disputes are involved. Respondents, however, deny that this is an appropriate model of adjudication here. Br. Opp. 10-11. Their position only underscores the conflict between the decision below and this Court's decision in *Jones*, which expressly deemed a statute of limitations *the one defense* directly analogous to PLRA exhaustion. *Jones*, 549 U.S. at 215, 220.

Ignoring this Court's analogy, respondents argue that the two affirmative defenses should be adjudicated differently because exhaustion is a "threshold" bar intended "to prevent premature lawsuits from going to trial *at all*," whereas a statute of limitations defense is merely a bar to liability that may be vindicated after trial. Br. Opp. 11-12. Respondents cite *Jones* for this view of exhaustion as a purely and solely threshold issue, Br. Opp. 11 (citing *Jones*, 549 U.S. at 202), but the cited page says nothing of the kind, and neither does any other. In fact, the law is clearly to the contrary: "Exhaustion requirements do not create absolute (or even qualified) rights to be free from litigation." *Davis v. Streekstra*, 227 F.3d 759, 763 (7th Cir. 2000). It is hard to imagine a more "threshold" inquiry than the question posed by a limitations defense: "Did plaintiff bring his suit in time?" Yet, juries resolve factual disputes about this issue as a uniform rule. Pet. 18.

Respondents also argue that PLRA exhaustion should be treated differently from a statute of limitations because successful invocation of the latter defense "ends the litigation rather than shunting it to another forum." Br. Opp. 11-12. But the *same is true for PLRA exhaustion* under the decision below: if the judge finds that the plaintiff is at fault for not exhausting, then the "the case is over." Pet. App. 6a. The decision below thus *supports* the analogy to statutes of limitations, even while failing to follow it through to the necessary conclusion that factual disputes about PLRA exhaustion, like limitations, must be tried to the jury.

5. Finally, respondents argue both that granting the petition would require this Court to reach a broad holding about the Seventh Amendment, Br. Opp. 6, and at the same time that the case is not about the Seventh Amendment at all, *id.* at 8. Neither contention is correct.

The petition raises only the narrow but significant question of the proper procedures for adjudicating one particular affirmative defense (the PLRA exhaustion requirement) to one particular type of claim (§ 1983 damages actions). There is not necessarily a right to a jury trial for all affirmative defenses (for example, equitable defenses may not be subject to a jury trial, *see* Pet. 17 n.1), and this Court need not hold or suggest otherwise to resolve this case. Petitioner simply contends that the exhaustion requirement in the PLRA does not permit deviation from the "usual practice" for handling legal affirmative defenses based on perceived policy concerns.

The importance of this narrow question, however, is reflected in its constitutional implications. As the decision below recognized, the question presented by this case bears directly on a plaintiff's Seventh Amendment rights. Pet. App. 1a-2a. Indeed, the decision below expressly acknowledged a potential conflict with this Court's Seventh Amendment jurisprudence. *See* Pet. App. 5a-6a. Respondents contend that the court of appeals "accounted for those cases" by taking the "pragmatic approach" of proposing a novel procedure whereby a jury can subsequently "reexamine" factual findings made by the judge. Br. Opp. 12. But it was *precisely* a "pragmatic approach" to the PLRA's exhaustion requirement that this Court rejected in *Jones*. *See* 549 U.S. at 213-17; Pet. 14-15. Again, in defending the decision below, respondents only highlight its conflict with this Court's precedent.

B. The lower courts are increasingly and intractably divided over the proper procedure for adjudicating the affirmative defense of exhaustion in cases governed by the PLRA. In a three-way split, lower courts have reached conflicting conclusions about this issue, resulting in disarray and uncertainty as to whether the affirmative defense is to be addressed at trial or resolved in a preliminary hearing, and whether judges or juries are the proper finder of disputed facts. Given the volume of prisoner litigation handled by the federal courts, the centrality of the exhaustion defense to these cases, and the simplicity with which this confusion can be dispelled, review by this Court is warranted.

1. Respondents suggest that "[t]here is no lower-court conflict justifying review" because three circuits agree that judges should resolve disputed facts regarding the exhaustion defense. Br. Opp. 4. As an initial matter, respondents ignore the courts that have expressly held that because failure to exhaust is an affirmative defense under the PLRA, disputed factual issues must be tried to a jury. *See* Pet. 27 (citing cases).

Respondents also misunderstand the issue that has divided the courts. The question raised here is not simply whether a judge or jury decides exhaustion-related facts, but rather how the affirmative defense is to be adjudicated in the course of litigation. *See* Pet. 2-3. On that question, respondents make no attempt to address the three-way split among lower courts. Respondents overlook the import of those cases reflecting the practice of the majority of circuits, which follow the "usual procedure" by testing the exhaustion defense at summary judgment. Pet. 26-27 (citing cases). These precedents demonstrate that most circuits do not treat exhaustion as a mandatory, "threshold" issue that must be resolved before litigation on the merits may commence. The majority of circuits instead treat PLRA exhaustion like any other affirmative defense. The decision below does not. It thus cannot be reconciled with the majority rule governing PLRA exhaustion procedure.

Respondents also gloss over important conflicts between the Ninth and Eleventh Circuits and the decision below. This is not merely a "formalistic dispute." Br. Opp. 4. The Ninth and Eleventh circuits do not specify *when* the exhaustion defense must be

resolved in the course of litigation, nor do they bar all pre-trial proceedings on the merits of a prisoner's claim pending a decision on exhaustion. The result is significant: prisoners in those circuits may proceed with discovery on their claims while the exhaustion defense is undecided, while prisoners in the Seventh Circuit are barred from moving forward on *any* aspect of their lawsuit until the issue is resolved by the court. In other words, the Seventh Circuit treats exhaustion as a total bar to litigation, while the Ninth and Eleventh Circuits do not. That substantive difference results in inconsistent adjudication of prisoners' rights litigation in the different circuits.

2. Respondents notably fail to acknowledge the numerous lower courts that have bemoaned the lack of guidance on the proper method for adjudicating the PLRA's exhaustion defense. *See, e.g., Gilmore v. Stalder*, 2008 WL 4155332, at *2-3, *5 (W.D. La. Sept. 8, 2008); *see also* Pet. 32 (citing cases). They likewise ignore the observation that "[c]ourts across the country are divided" on this issue. *Singleton v. Johnson*, 2008 WL 3887633, at *1 (S.D. Ga. Aug. 18, 2008).

Respondents do, however, appear to recognize that the question presented ultimately will require this Court's attention. *See* Br. Opp. 12. They simply urge deferral of that attention pending more input on the "practical 'traffic control' issues at stake." Br. Opp. 12-13. But there is no need for more "practical" input, particularly given this Court's admonition in *Jones* that "practical" concerns about prisoner litigation should *not* compel judge-made departures from

established procedures governing prisoner litigation. Only Congress can rewrite the rules as necessary and appropriate to provide different "traffic control" tools. Delaying review will result in the expansion of the Seventh Circuit's invented procedures, or the judicial invention of even more creative procedures—every one of which will be at odds with existing federal civil rules, which already provide a complete structure for adjudicating affirmative defenses. No matter how clever the scheme a court may devise for addressing the "'traffic control' issues at stake" in these cases, a scheme that departs from the federal rules is categorically impermissible, as *Jones* makes clear. The fact that courts are likely to test a variety of different departures from the standard rules, as respondents suggest, is not a reason to delay review—it is a reason to review this issue *now*, to stem the inevitable tide of error before it is fully unleashed.

C. Respondents also do not address the significant adverse consequences of the decision below for parties and courts, which are already suffering costly delays, burdens, and inefficiencies trying to implement the novel procedural system prescribed by the court of appeals. For example, some district courts have abandoned pending summary judgment motions in favor of preliminary fact-finding hearings on exhaustion. *See Hatch v. Cravens*, 2008 WL 2952355 (S.D. Ill. July 30, 2008); *Snipes v. Witthrop*, 2008 WL 2952359 (S.D. Ill. July 30, 2008). Still another court that had denied a defendant's summary judgment motion due to factual disputes reconsidered its decision and set the matter for a preliminary hearing. *Piggie v. Robertson*, 2009 WL 198004 (N.D. Ind. Jan.

23, 2009). Further underscoring the confusion sown by the decision below, yet another district court recently employed a hybrid approach: addressing PLRA exhaustion at summary judgment but explaining as part of the legal standard that the judge must now resolve factual disputes. *See Chess v. Pindelski*, 2009 WL 174992, at *1 (N.D. Ill. Jan. 23, 2009).

Nor is the uncertainty spawned by the decision below limited to the Seventh Circuit. A district court in Pennsylvania felt compelled to excuse an untimely summary judgment motion on the exhaustion issue, citing the decision below for the proposition that "by raising the affirmative defense of Plaintiff's failure to exhaust, Defendant raises a question of law that must be resolved by the court before proceeding to a trial on the merits." *Drippe v. Gototweski*, 2008 WL 4919401, at *1 (M.D. Pa. Nov. 17, 2008). Of course, PLRA exhaustion is an affirmative defense, not a "question of law," but the flawed analysis of the decision below is generating considerable uncertainty for district courts.

Moreover, as predicted in the petition (Pet. 35), the decision below is prejudicing prisoners who are incompetent to litigate their own claims and therefore require the appointment of counsel. For example, in one case a court found it necessary to appoint counsel to a *pro se* prisoner, but concluded based on the decision below that "before the court expends more energy attempting to find pro bono counsel . . . the issue of exhaustion of administrative remedies should first be resolved." *Mendoza v. Ring*, 2008 WL 2959848, at *1 (C.D. Ill. July 30, 2008). As a result, a plaintiff who was deemed unable to litigate his

own claims will be without the benefit of counsel for a potentially dispositive fact-finding process.

D. Finally, respondents nowhere deny that this case is an ideal vehicle for resolving the important question presented. Because the Seventh Circuit has already found that there are genuine factual disputes about exhaustion in this case, Pet. App. 24a-35a, the issue of the appropriate procedure for adjudicating those disputes is ripe and cleanly presented. And because the "present case is one in which the exhaustion issue and the merits issue share common facts," Pet. App. 7a, it effectively demonstrates the conflict between the decision below and the usual practice under the Federal Rules and the Seventh Amendment.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted, or the decision below should be summarily reversed.

Respectfully submitted,

DAVID M. FRIEBUS
53 W. Jackson Blvd.
Suite 750
Chicago, Illinois 60604
(312) 404-5068

JONATHAN D. HACKER
(Counsel of Record)
JUSTIN FLORENCE*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted only in Massachusetts*

WALTER DELLINGER**
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE
CLINIC
***May be contacted at
O'Melveny & Myers LLP*

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In the
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CHRISTOPHER R. PAVEY,
PETITIONER,
v.
PATRICK CONLEY, *ET AL.*,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* UPTOWN PEOPLE'S LAW CENTER, LEGAL AID SOCIETY OF NEW YORK'S PRISONERS' RIGHTS PROJECT, D.C. PRISONERS' PROJECT OF THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, PRISONERS' LEGAL SERVICES OF NEW YORK, PRISON LAW OFFICE, TEXAS CIVIL RIGHTS PROJECT, FLORIDA INSTITUTIONAL LEGAL SERVICES, INC., PRISON LEGAL NEWS, RODERICK MACARTHUR JUSTICE CENTER AT NORTHWESTERN UNIVERSITY SCHOOL OF LAW AND JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF THE YALE LAW SCHOOL IN SUPPORT OF PETITIONER

Zachary T. Fardon
Matthew L. Kutcher
Catherine K. Dick
Allison V. Passman
Johanna M. Spellman
Latham & Watkins LLP
Sears Tower, Suite 5800
233 S. Wacker Drive
Chicago, IL 60606
(312) 876-7700

J. Scott Ballenger
Counsel of Record
Latham & Watkins LLP
555 11th Street NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE SEVENTH CIRCUIT'S REASONING IS INCONSISTENT WITH *JONES*, USURPS CONGRESS'S AUTHORITY, AND MISCONSTRUES CONGRESS'S INTENT 6

A. The Seventh Circuit Contravened This Court's Precedent And Engaged In Judicial Legislation 6

B. The Seventh Circuit Misconstrued Congress's Intent Underlying the PLRA 12

1. The Seventh Circuit Ignored One Of The PLRA's Two Purposes—To Facilitate Consideration Of Meritorious Litigation 12

2. The PLRA Has Already Achieved Its Other Purpose—To Reduce The Quantity Of Prisoner Litigation 14

TABLE OF CONTENTS—Continued

Page

II. THE SEVENTH CIRCUIT'S PROCEDURE IS INEFFICIENT, UNJUST, AND HINDERS PLAINTIFFS' ABILITIES TO OBTAIN TIMELY RELIEF FOR MERITORIOUS CLAIMS 16

A. The New Procedure Will Introduce Delay And Waste Judicial Resources Through Mandatory Preliminary Resolution Of Complex Exhaustion Factual Disputes 16

B. Requiring Prisoners To Go Back And Exhaust Ignores The Realities Of Prison Grievance Systems And May Prevent Meritorious Plaintiffs From Litigating Their Claims 20

1. Many Prisoners Will Not Be Able To Exhaust 20

2. The New Procedure Will Likely Subject Prisoners To Increased Interference and Retaliation From Prison Officials 21

3. Requiring A Second Attempt At Exhaustion Will Create Serious Problems With Statutes Of Limitations And Staleness Of Evidence 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 8

Barndt v. Pucci,
No. 3:CV-05-2666, 2007 WL 1031509 (M.D. Pa. Mar. 30, 2007) 19

Brown v. Croak,
312 F.3d 109 (3d Cir. 2002) 19

Brown v. Morgan,
209 F.3d 595 (6th Cir. 2000) 24

Cleavinger v. Saxner,
474 U.S. 193 (1985) 23

Clifford v. Gibbs,
298 F.3d 328 (5th Cir. 2002) 24

Crawford-El v. Britton,
523 U.S. 574 (1998) 7

Crump v. Darling,
No. 1:06-cv-20, 2007 WL 851750 (W.D. Mich. Mar. 21, 2007) 24

Dale v. Lappin,
376 F.3d 652 (7th Cir. 2004) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Daskalea v. District of Columbia,
227 F.3d 433 (D.C. Cir. 2000) 13

Dole v. Chandler,
438 F.3d 804 (7th Cir. 2006) 19, 21, 22

Ford v. Johnson,
362 F.3d 395 (7th Cir. 2004) 11, 21, 24

Frost v. McCaughtry,
No. 99-2061, 2000 WL 767841 (7th Cir. June 12, 2000) 18

Harris v. Hegmann,
198 F.3d 153 (5th Cir. 1999) 24

Heckler v. Mathews,
465 U.S. 728 (1984) 7

Hemphill v. New York,
380 F.3d 680 (2d Cir. 2004) 22

Hines v. Gomez,
108 F.3d 265 (9th Cir. 1997), *cert. denied*, 524 U.S. 936 (1998) 23

INS v. Chadha,
462 U.S. 919 (1983) 8

TABLE OF AUTHORITIES—Continued

Page(s)

International Union, Union Automobile Aerospace & Agricultural Implement Workers of America, AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 7

Johnson v. Jones, 340 F.3d 624 (8th Cir. 2003) 9

Johnson v. Rivera, 272 F.3d 519 (7th Cir. 2001) 24

Jones v. Bock, 549 U.S. 199 (2007) 3, 4, 7, 12

Jones'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) 13

Kaba v. Stepp, 458 F.3d 678 (7th Cir. 2006) 9, 22

Klebanowski v. Sheahan, 540 F.3d 633 (7th Cir. 2008) 17

Lamie v. United States Trustee, 540 U.S. 526 (2004) 7

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 7

License Tax Cases, 72 U.S. (5 Wall.) 462 (1867) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Madrid v. Gomez,
889 F. Supp. 1146 (N.D. Cal. 1995) 13

Martin v. Sizemore,
No. Civ.A. 05-CV-105-KKC, 2005 WL
1491210 (E.D. Ky. June 22, 2005) 18

Miller v. Norris,
247 F.3d 736 (8th Cir. 2001) 22

Morales v. Mackalm,
278 F.3d 126 (2d Cir. 2002) 11

Porter v. Nussle,
534 U.S. 516 (2002) 11

Rodriguez v. United States,
480 U.S. 522 (1987) 8

Sheppard v. Phoenix,
210 F. Supp. 2d 450 (S.D.N.Y. 2002) 13

Snyder v. Goord,
No. 9: 05-CV-01284, 2007 WL 957530
(N.D.N.Y. Mar. 29, 2007) 19

Steel Co. v. Citizens for a Better Environment,
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548 U.S. 81 (2006) 7, 24

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INTEREST OF *AMICI CURIAE*[1]

Proposed *amici* are organizations with an interest in prisoner civil rights litigation. Nine of the ten *amici* represent prisoners in a variety of civil legal matters, and the tenth publishes a journal whose censorship in prison is the subject of prisoner First Amendment challenges. Each has a strong interest in ensuring that prisoners have full and fair access to the courts, and that the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, §§801-10, 110 Stat. 1321-66 to -77 (1996) is properly effectuated to enable the efficient litigation of meritorious lawsuits.

The **Uptown People's Law Center**, a non-profit organization since 1975, provides legal representation, advocacy and education for poor and working people in and around Chicago, including direct legal assistance to over 100 prisoners in Illinois.

The **Legal Aid Society of New York's Prisoners' Rights Project**, a non-profit organization, advocates administratively and pursues class action and test case litigation to protect the legal rights of prisoners in New York state prisons and New York City jails.

The **D.C. Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs**, a non-profit organization, has engaged in broad-based class action litigation, improving medical

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[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to this filing. Letters of consent have been filed with the clerk.

and mental health services, reducing overcrowding, and improving overall conditions at correctional facilities wherever D.C. inmates are held.

Prisoners' Legal Services of New York, a non-profit organization, has been providing civil legal services to indigent inmates in New York State prisons for over thirty-two years.

The **Prison Law Office**, a non-profit organization, represents individual prisoners, engages in class action and other impact litigation, educates the public about prison conditions, and provides technical assistance to attorneys throughout the country.

The **Texas Civil Rights Project**, a non-profit organization founded in 1990, promotes racial, social, and economic justice through education and litigation, including litigation of prisoners' claims.

Florida Institutional Legal Services, Inc., a non-profit organization, has been representing indigent institutionalized people in Florida state prisons in individual and class action matters for over 30 years.

Prison Legal News ("PLN"), a non-profit corporation, publishes a nationally distributed monthly journal which reports on news, recent court decisions, and other developments relating to the civil and human rights of prisoners. Approximately sixty-five percent of PLN subscribers are prisoners.

The **Roderick MacArthur Justice Center at Northwestern University School of Law** is a public interest law firm that was founded to fight for human rights and social justice, particularly in the context of the criminal justice system. The fair treatment of prisoners is a particular concern of the Center.

The **Jerome N. Frank Legal Services Organization of the Yale Law School** provides free representation to indigent people in need of legal aid, including legal assistance to persons incarcerated in state and federal prisons in Connecticut and New York since 1970.

SUMMARY OF ARGUMENT

The Seventh Circuit contravened *Jones v. Bock*, 549 U.S. 199 (2007), and stepped outside its constitutional role by inventing a new procedure for reviewing administrative exhaustion defenses that has no basis in either the PLRA or the Federal Rules of Civil Procedure. The invented procedure is unjust and inefficient in practice, burdening the courts with additional procedures and meritorious litigants with numerous practical and legal problems.

The PLRA provides that prior to filing a suit, prisoners must exhaust "such administrative remedies as are available." 42 U.S.C. §1997e(a). In *Jones*, this Court held that the PLRA's exhaustion requirement is an affirmative defense to be pleaded by the defendant and adjudicated like any other. 549 U.S. at 216. This Court observed that while the PLRA requires district courts to screen prisoner cases at an early stage and *sua sponte* dismiss on any of four grounds, *see* 28 U.S.C. §1915A(b), 42 U.S.C. §1997e(c)(1), Congress conspicuously did not list failure to exhaust as one of those grounds. *See* 549 U.S. at 214, 216. This Court held that the statutory screening requirement "does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself" and that any further modifications to the Federal Rules of Civil Procedure

should be made through "established rulemaking procedures" and not "on a case-by-case basis by the courts." *Id.* at 214, 224.

Directly contradicting *Jones*, the Seventh Circuit held that exhaustion is a matter of "judicial traffic control" that for policy reasons should be decided prior to any merits discovery and pursuant to a newly invented and Byzantine procedure. App.4a-6a.[2] The Circuit's preliminary exhaustion screening "sequence" requires the district judge first to "conduct[] a hearing on exhaustion and permit[] whatever discovery relating to exhaustion [and only to exhaustion] he deems appropriate," App.6a, except that in some "exceptional circumstances" limited merits discovery might also be permitted, App.7a. After the hearing, the judge must determine if the prisoner exhausted his administrative remedies. App.6a. If the prisoner "failed to exhaust ... he must go back and exhaust." *Id.* If the prisoner has "no unexhausted remedies," but his failure to exhaust was "innocent (as where prison officials prevent a prisoner from exhausting his remedies)," he is "given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround)." *Id.* If "the failure to exhaust was the prisoner's fault," the action is "over." *Id.*

"If and when the judge determines that the prisoner has properly exhausted his administrative remedies," the case may "proceed to pretrial discovery, and if necessary a trial, on the merits." *Id.* At that

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[2] "App." refers to Appendix to the Petition for Writ of Certiorari.

point, "if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies." *Id.*

Amici, experienced practitioners in prison litigation, agree with Petitioner that the lower court's new exhaustion procedure cannot be reconciled with this Court's decisions.[3] *Amici* particularly wish to highlight the unjustifiable, extra-statutory nature of the Seventh Circuit's invented procedure, and the detrimental practical effects it will have on courts and plaintiffs with meritorious claims. The decision below raises the following legal and practical concerns:

- The Circuit invented this procedure out of whole cloth based on perceived policy concerns with no grounding in the PLRA or the Federal Rules.
- The Circuit focused on only one of Congress's two purposes in passing the PLRA—reducing the quantity of litigation—and failed to assess the impact of its procedure on the second—facilitating adjudication of meritorious claims.
- The Circuit erroneously relied on an outdated assessment of the quantity of prisoner litigation, overlooking the dramatic reduction in prisoner lawsuits that Congress already achieved through the PLRA.

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[3] *Amici* agree with the entire Petition, but focus this brief on *Jones* and practical impact issues.

- The new procedure will squander judicial resources by requiring courts to resolve complex factual disputes over exhaustion even where a case could easily be disposed of on the merits.
- The new procedure ignores practical realities of prison grievance systems and increases the likelihood that prison officials will interfere with exhaustion.
- The new procedure limits prisoners' ability to prepare their claims and obtain timely relief.

This Court should summarily reverse or grant certiorari to prevent further deviations from the PLRA, the Federal Rules, and this Court's precedent.

ARGUMENT

I. THE SEVENTH CIRCUIT'S REASONING IS INCONSISTENT WITH *JONES*, USURPS CONGRESS'S AUTHORITY, AND MISCONSTRUES CONGRESS'S INTENT

A. The Seventh Circuit Contravened This Court's Precedent And Engaged In Judicial Legislation

The Seventh Circuit's invented "judicial traffic control" procedure for administrative exhaustion contravenes this Court's precedent and impermissibly amends the PLRA. The new procedure fails to treat administrative exhaustion like the ordinary affirmative defense that this Court held it to be in *Jones*. Instead the court of appeals wrongly analogized exhaustion to jurisdiction, and erected a preliminary screening procedure akin to the one the PLRA authorizes for

several issues but conspicuously *not* for exhaustion. *See Jones*, 549 U.S. at 214; *see also Woodford v. Ngo*, 548 U.S. 81, 101 (2006) (PLRA's exhaustion requirement is non-jurisdictional).

The Seventh Circuit disregarded this Court's recent directive in *Jones* that courts should follow "the usual practice" under the Federal Rules except insofar as the PLRA explicitly provides otherwise. 549 U.S. at 212. It also ignored this Court's caution against judicial rulemaking based on "a perceived problem with suits by inmates," and its admonition that "[i]f there is a compelling need to frame new rules of law ..., presumably Congress either would have dealt with the problem in the [PLRA], or will respond to it in future legislation." *Crawford-El v. Britton*, 523 U.S. 574, 596-97 (1998); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (noting that changes "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation").

In substance, the Seventh Circuit effectively amended the PLRA, usurping Congress's role and "the policymaking and legislative functions of duly elected representatives." *Heckler v. Mathews*, 465 U.S. 728, 741 (1984); *see also United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897) ("[C]ongress is the body to amend [a statute] and not this court, by a process of judicial legislation wholly unjustifiable."). "It is well established that 'when the statute's language is plain, the sole function of the courts ... is to enforce it according to its terms.'" *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (citations omitted). Even a "desirable statutory addition," does not justify "judicial legislation." *Int'l Union, Union Auto. Aerospace &*

Agric. Implement Workers of Am., AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 696, 702-03 (1966).

When Congress chooses to amend a statute or the Federal Rules, it does so only after engaging in "an extensive deliberative process involving many reviewers." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a [Federal Rule of Civil Procedure] ...."); *INS v. Chadha*, 462 U.S. 919, 959 (1983) ("[L]egislation by the national Congress [is] a step-by-step, deliberate and deliberative process."). That process draws views from all stakeholders and ensures that important considerations are fully aired. Judges considering individual cases often lack the information or perspective necessary to understand how a procedural modification will affect the administration of justice as a whole. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice ....").

The Circuit's original and amended decisions illustrate the practical problems that arise when a court embarks on freelance policymaking under the guise of interpretation. After the original opinion issued, plaintiff petitioned for rehearing or rehearing *en banc*. *See* App.36a. *Amici* filed a brief in support of that petition highlighting certain detrimental consequences of the panel's absolute bar on merits discovery and its requirement that even "innocent" prisoners must "go back and exhaust." The Circuit denied the petition for rehearing, but tacitly admitted flaws in its procedure by amending the opinion that same day. App.1a.

First, it exempted from the absolute bar on merits discovery "exceptional cases in which expeditious resolution of the litigation requires that some discovery be permitted before the issue of exhaustion is resolved." App.7a. Second, the amendment added an escape hatch where prison officials prevented the initial attempt at exhaustion:

> [A]lthough [the prisoner] has no unexhausted administrative remedies, the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), and so he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround).

App.6a.

Requiring a prisoner whose failure to exhaust was "innocent" to try to exhaust again conflicts with the statutory command that "no action shall be brought" until "such remedies as are available are exhausted." 42 U.S.C. §1997e(a). Courts applying §1997e(a) have assessed the availability of remedies at the time the prisoner "brought" the action or tried initially to exhaust. *See Johnson v. Jones*, 340 F.3d 624, 627-28 (8th Cir. 2003) (measuring compliance with exhaustion requirement at time suit filed). Where remedies were unavailable, courts permitted the prisoner's case to proceed. *See, e.g., Kaba v. Stepp*, 458 F.3d 678, 683-86 (7th Cir. 2006) (if inmate was prevented from filing grievance, he lacked available remedies and suit could proceed). Those decisions are consistent with the

PLRA, which requires exhaustion of administrative remedies that are available rather than compelling prisoners to wait until such remedies become available. By requiring a second attempt at exhaustion, the Circuit shifts the exhaustion inquiry from institutional availability at the time the prisoner "brought" suit to the availability of such remedies at whatever later point a court might choose to address the issue. New exhaustion requirements that spring into existence midway through the litigation make no sense and find no support in the language of the PLRA.

Additionally, the court's amended decision tree is deeply confusing on its face. For instance, the new provision applying to "innocent" prisoners appears to subsume the prior clause, which instructs a plaintiff who has "failed to exhaust" to "go back and exhaust." App.6a. Presumably, a plaintiff who failed to exhaust and must "go back" to exhaust falls into the "innocent" category of prisoners who must also "be given another chance to exhaust"—or else he would belong in the third category of prisoners, at fault for their own failure to exhaust (for whom the case is "over"). *Id.* The Seventh Circuit failed to clarify the relationship between these overlapping categories, and yet the lower courts and litigants must attempt to make sense of them.

The new procedure also creates confusion with its undefined, non-statutory terms. For example, while a prisoner must be "innocent" in his failure to exhaust to get another chance, the Circuit does not explain what constitutes "innocen[ce]." That concept may or may not correspond to the actual statutory language, which focuses on whether a remedy was practically *available* to the prisoner, and simply introduces needless

confusion. Nor does the procedure explain how or when a court determines that the undefined "runaround" exists (thus excusing the prisoner from a second attempt at exhaustion). Because courts typically dismiss without prejudice, rather than stay, unexhausted claims, *see, e.g.*, *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004); *accord Morales v. Mackalm*, 278 F.3d 126, 128, 131 (2d Cir. 2002) (per curiam), *abrogated on other grounds by Porter v. Nussle*, 534 U.S. 516, 532 (2002), no court will have jurisdiction during a prisoner's second attempt at exhaustion to consider whether he is getting the "runaround" or to put a stop to it. Will prisoners be permitted to prove prior to dismissal that they likely *will* get a "runaround?" Or must they go through the "runaround," re-file their lawsuits, pass the initial screening again, and prove it in a second exhaustion hearing?

The Seventh Circuit's efforts to remedy its flawed procedure with additional extra-statutory terms and requirements only layered more confusion onto its already complicated structure, and illustrates why the formulation of complex new procedural devices should be left to the proper legislative and rulemaking process. No matter how lower courts interpret and apply it, the invented procedure violates this Court's prohibition against creating new rules or judicially amending statutes. This Court should summarily reverse in favor of the procedures already established under the PLRA and Federal Rules or grant certiorari to consider it.

B. The Seventh Circuit Misconstrued Congress's Intent Underlying the PLRA

1. The Seventh Circuit Ignored One Of The PLRA's Two Purposes—To Facilitate Consideration Of Meritorious Litigation

The Seventh Circuit justified its invented procedure by citing "the statutory goal of sparing federal courts the burden of prisoner litigation," App.6a, but ignored the second, equally important goal: facilitating consideration of meritorious litigation. *See Jones*, 549 U.S. at 204. The one-sided nature of the Seventh Circuit's analysis underscores why public policy is best left to Congress rather than the courts.

Congress recognized (and the Seventh Circuit overlooked) that meritorious prisoner litigation serves an important role. *See, e.g.*, 141 Cong. Rec. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) (citing need to "free up judicial resources for claims with merit by both prisoners and nonprisoners"); *id.* at S14,627 (statement of Sen. Hatch) ("I do not want to prevent inmates from raising legitimate claims."). Prison litigation is sometimes the only check on serious abuses that occur in prisons. *See* Margo Schlanger, *The Political Economy of Prison and Jail Litigation*, Prison Legal News, June 2007, at 1 ("[A]t least in many states, litigation is about the only reform tool available."). It is especially important when the prison system itself is corrupt.[4] Violence is common in prison,

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[4] John Eligon, *Correction Officers Accused of Letting Inmates Run Rikers Island Jail*, N.Y. Times, Jan. 23, 2009, at A20 (guards indicted for using inmates "to intimidate, threaten and silence uncooperative prisoners with brute force" and

and guards may ignore inmate-on-inmate abuse or participate in abuse themselves.[5] Moreover, litigation frequently implicates systemic issues, such as conditions of a prison or jail.[6]

The Seventh Circuit's decision will have significant negative consequences for litigants with meritorious claims. Those consequences are discussed in greater

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orchestrating cover-ups); Ashwin Verghese, *4 Graterford Guards Face Charges*, Philadelphia Inquirer, Sept. 22, 2007, at B3 (guards charged with extortion and conspiracy to distribute drugs to inmates).

5 *See, e.g., Daskalea v. District of Columbia*, 227 F.3d 433, 436-37, 439 (D.C. Cir. 2000) (frequent sexual harassment culminated in officer inciting inmates to drag prisoner from her cell and "forc[ing] her to dance naked on a table before more than a hundred chanting, jeering guards and inmates"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1166-67 (N.D. Cal. 1995) (officers bathed mentally ill prisoner in scalding water resulting in second and third degree burns over one-third of his body, after which "skin ... peeled off and was hanging in large clumps around his legs"); Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* 114 (2001), *available at* http://www.hrw.org/legacy/reports/2001/prison/report8.html#_1_50 (officer refused to investigate Texas inmate's abuse allegations, telling inmate he must be gay for being victim of multiple rapes).

6 *See, e.g., Coleman v. Schwarzenegger*, Tentative Ruling, Nos. CIV S-90-0520 LKK JFM P & C01-1351 THE, at 2 (E.D. Cal. & N.D. Cal. Feb. 9, 2009) (population reduction required because California prisons are operating near double capacity causing "'substantial risk to the health and safety of ... the inmates'") (citation omitted); *Sheppard v. Phoenix*, 210 F. Supp. 2d 450, 458-60 (S.D.N.Y. 2002) (terminating injunction that cured problem of excessive force, noting drastic reduction in injury to inmates and staff); *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1122-23 (W.D. Wis. 2001) (ordering mentally ill prisoners removed from Wisconsin's Supermax facility due to "increased depression, hallucination, derealization and acute suicidality").

depth below, *see infra* at 20-25, and in the Petition, and include *at a minimum* a new and quite substantial delay in the adjudication of claims. By foregoing any analysis of how its procedure would affect meritorious litigation, the Seventh Circuit demonstrated why courts should leave policy decisions to Congress. *See License Tax Cases*, 72 U.S. (5 Wall.) 462, 469 (1867) ("This court can know nothing of public policy except from the Constitution and the laws .... Considerations of that sort must, in general, be addressed to the legislature.").

2. The PLRA Has Already Achieved Its Other Purpose—To Reduce The Quantity Of Prisoner Litigation

The Seventh Circuit's concern about the "burden" of prison litigation is outdated. App. 6a-7a; *see also* 141 Cong. Rec. S14,627 (statement of Sen. Hatch). The perceived "burden" that the PLRA's supporters cited in 1995 has been significantly mitigated by the PLRA's dramatic success in reducing the number of prisoner civil rights and prison conditions cases brought in federal court. In 1995—the year preceding implementation of the PLRA—41,679 such petitions were filed.[7] Within three years, the number filed had dropped by over 30% to 26,462 cases.[8] Between 1999 and 2006, the number of prisoner petitions leveled off

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[7] *See* Administrative Office of United States Courts, *Judicial Business: 1998 Annual Report of Director*, U.S. Courts—Civil Cases Commenced, During Twelve-Month Ended Sept. 30, 1994 through 1998 (1998) 146, *available at* http://www.uscourts.gov/dirrpt98/c2asep98.pdf.

[8] *See id.*

at approximately 24,500, declining to 24,025 in 2007.[9] Because the inmate population grew by over 15% between 1999 and 2007, the steady rate in total filings reflects a continued decline in the number of petitions filed per inmate.[10]

The PLRA has also significantly cut down on the number of prisoner cases that go to trial. Between 1994 and 1996, approximately 1000 prisoner civil rights cases per year went to trial in the federal district courts. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1643 (2003). In 2001, there were fewer than 500. *Id.* In the 12-month period ending March 31, 2007, fewer than 300 reached trial.[11]

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9 *See* Tracey Kyckelhahn & Thomas H. Cohen, U.S. DOJ, Bureau of Justice Statistics, *Civil Rights Complaints in U.S. District Courts, 1990-2006* 8 (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/crcusdc06.pdf; Administrative Office of United States Courts, *Judicial Business: 2007 Annual Report of Director*, U.S. District Courts—Civil Cases Commenced, During the 12-Month Ending Sept. 30, 2006 and 2007 146 (2008), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf.

10 *See* Allen J. Beck, U.S. DOJ, Bureau of Justice Statistics, *Prisoners in 1999* 1 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p99.pdf (1999 total incarcerated population: 2,026,596); Heather C. West & William J. Sabol, U.S. DOJ, Bureau of Justice Statistics, *Prisoners in 2007* 7 (2008), *available at* http://www.ojp.gov/bjs/pub/pdf/p07.pdf (2007 total incarcerated population: 2,413,112).

11 *See* Administrative Office of United States Courts, *Federal Judicial Caseload Statistics*, U.S. District Courts—Civil Cases Terminated, During 12-Month Period Ending Mar. 31, 2007 52-53 (2007), *available at* http://www.uscourts.gov/caseload2007/tables/C04Mar07.pdf.

The Circuit's reliance on an outdated policy concern to invent an unnecessary remedy further demonstrates why legislation is best left to Congress.

II. THE SEVENTH CIRCUIT'S PROCEDURE IS INEFFICIENT, UNJUST, AND HINDERS PLAINTIFFS' ABILITY TO OBTAIN TIMELY RELIEF FOR MERITORIOUS CLAIMS

The Seventh Circuit's invented procedure creates inefficiencies and inequities not present under the PLRA or the Federal Rules. *Amici* believe that the new exhaustion procedure increases, rather than reduces, inefficiencies for the courts, while hampering meritorious prisoners' already limited ability to pursue their claims.

A. The New Procedure Will Introduce Delay And Waste Judicial Resources Through Mandatory Preliminary Resolution Of Complex Exhaustion Factual Disputes

The Seventh Circuit's procedure will needlessly delay the resolution of prisoner claims and squander rather than conserve judicial resources. Once exhaustion is "contested" by the defendant, it triggers the mandatory "sequence." In *amici*'s experience, defendants routinely assert a failure to exhaust as a boilerplate affirmative defense to PLRA claims, and therefore the sequence will almost always be triggered. As a result, the Seventh Circuit has effectively created an automatic (and protracted) stay on litigating the merits of most, if not all, prisoner actions where a colorable defense is raised, to permit a whole new threshold round of discovery and hearings not previously known in federal litigation. Requiring

resolution of these disputes at the outset of virtually every PLRA case (that has passed initial screening) will unjustifiably delay the resolution of these claims. It also imposes a substantial burden on the district courts and severely limits their discretion to manage their caseloads.

The Seventh Circuit's apparent belief that mandatory threshold exhaustion determinations will conserve judicial resources is excessively simplistic. While the invented procedure may screen out some claims that would otherwise have proceeded a bit further, it also greatly increases the attention and resources devoted to litigating the issue where the prisoner properly exhausted. Furthermore, the premise that it is always easier to dispose of a PLRA case on exhaustion grounds than on the merits is seriously flawed. Often the merits are *less* complicated than the exhaustion question, and can be disposed of relatively quickly and easily on a motion for summary judgment.[12] By transforming exhaustion into a quasi-jurisdictional threshold issue, the new procedure deprives courts of a valuable and efficient tool. *Compare, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (courts cannot bypass jurisdictional issues to dismiss on easier merits grounds).

In a typical federal agency case, exhaustion may turn on a simple question, such as whether a certified mailing was sent by the deadline. But PLRA exhaustion generates a large number of sharp factual

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12 *See, e.g., Klebanowski v. Sheahan*, 540 F.3d 633, 639-40 (7th Cir. 2008) ("[B]ypass[ing]" complicated availability-of-exhaustion issues to affirm summary judgment on merits).

disputes due to the chaotic nature of prison administrative systems. The complex rules governing prison grievance systems are not standardized like federal agency administrative remedy systems. They are specific to each jurisdiction and vary greatly from state to state, in privately-run prisons, and in the federal system.[13] The same correctional staff who are likely the subjects of the complaints (or their co-workers) administer these rules, rather than the trained, independent hearing officers who typically run administrative agencies. Many prison grievance rules are also ambiguous, leaving considerable room for interpretation by the staff.

PLRA exhaustion disputes therefore frequently involve questions of whether institutions were functioning according to their rules, whether prison staff members were acting lawfully and whether prisoners or prison staff are telling the truth. For example, in the cases where the grievance system that exists on paper does not reflect how the institution actually administers it, disputes may arise regarding the nature of the grievance system and whether it even exists, not just whether the prisoner used it.[14]

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[13] The prison grievance policies of the federal prison system, the states, the District of Columbia, and privately-run prisons are available at http://law.wustl.edu/Faculty/index.asp?id=6430 (Wash. Univ. Law, *Prison and Jail Grievance Policies*) (last visited Feb. 9, 2009).

[14] *See, e.g.*, *Frost v. McCaughtry*, No. 99-2061, 2000 WL 767841, at *1 (7th Cir. June 12, 2000) (prison's administrative changes raised factual question on availability of grievance appeal); *Martin v. Sizemore*, No. Civ.A. 05-CV-105-KKC, 2005 WL 1491210, at *1, *3 (E.D. Ky. June 22, 2005) (plaintiff alleged "'[t]here is no grievance committee here, your grievances are

Similarly, because prison staff administer the grievance process, prisoners must depend on them both to provide the remedy and for instructions on how to proceed. As a result, disputes often arise because prison staff made remedies *de facto* unavailable through misinformation, threats, retaliation, or failure to pick up or deliver grievances.[15] The extensive factual disputes about the availability of remedies in this case vividly illustrate this point.

Forcing judges to resolve these complex factual disputes at the outset, in a procedure separate from (and sometimes duplicative of) resolution of the merits, will hinder courts' ability to efficiently dispose of prisoner cases on summary judgment where the merits are more simple than exhaustion.

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simply turned over to the person you file on and you get threatened'").

[15] *See, e.g., Dole v. Chandler*, 438 F.3d 804, 807-08 (7th Cir. 2006) (guard took prisoner's grievance for mailing, but prison had no record of it); *Brown v. Croak*, 312 F.3d 109, 113 (3d Cir. 2002) (remedies "unavailable" if prison officials misinformed prisoner about them); *Barndt v. Pucci*, No. 3:CV-05-2666, 2007 WL 1031509, at *2-3 (M.D. Pa. Mar. 30, 2007) (factual dispute over exhaustion where prisoner alleged he could not grieve because he was deprived of writing materials and legal paperwork); *Snyder v. Goord*, No. 9: 05-CV-01284, 2007 WL 957530, at *9-10 (N.D.N.Y. Mar. 29, 2007) (dispute as to whether official's threats deterred inmate from filing grievance).

B. Requiring Prisoners To Go Back And Exhaust Ignores The Realities Of Prison Grievance Systems And May Prevent Plaintiffs From Litigating Meritorious Claims

1. Many Prisoners Will Not Be Able To Exhaust

Given the realities of the prison systems, the Seventh Circuit's mandate that prisoners who are "innocent" concerning any initial failure to exhaust nonetheless must be "given another chance to exhaust," for reasons explained above, is inconsistent with the statutory language. It is also impractical and may be impossible. Prison grievance systems are only designed to review complaints within a short period of time (anywhere from less than one week to one month) after the complained-of conduct occurred.[16] Federal and state prisons in the Seventh Circuit require that prisoners file grievances within 14 to 60 days after the complained-of conduct occurred.[17] While some prisons

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[16] *See, e.g.*, 28 C.F.R. §542.14(a) (20 days); Ky. Dep't of Corrections, *Policies and Procedures: Inmate Grievance Procedure*, No. 14.6 8, 13 (2008), *available at* http://www.corrections.ky.gov/NR/rdonlyres/EFF984A4-958F-4DA2-96E8-4CD391BFCD75/160608/14992.pdf (5 days); 06-070-002 R.I. Code R. §10 (Weil 2008) (3 days).

[17] *See, e.g.*, 28 C.F.R. §542.14(a) (20 days); Wis. Admin. Code DOC §310.09(6) (2008) (14 days); Ill. Admin. Code tit. 20, §504.810(a) (2008) (60 days); Ind. Dep't of Correction, *Policy and Administrative Procedures: Offender Grievance Process*, No. 00-02-301 22 (2005), *available at* http://www.law.yale.edu/documents/pdf/Indiana_Grievance_Policy.pdf (20 days).

allow extensions for "good cause," such determinations are completely discretionary.[18]

In all likelihood, therefore, prisons will routinely refuse to entertain such renewed exhaustion attempts—even when the court has determined that the initial failure to exhaust was "innocent." A subsequent reviewing court will then presumably be called upon to evaluate whether administrative remedies were ever genuinely made available or whether the prisoner instead got "a runaround" from prison officials. In the end, either such "innocent" prisoners will get to proceed with their claims anyway (in which case the Seventh Circuit's detour was a waste of time), or they will somehow be barred by exhaustion even though the administrative process was effectively unavailable to them (which is directly contrary to the statutory language).[19]

2. The New Procedure Will Likely Subject Prisoners To Increased Interference and Retaliation From Prison Officials

Prisoners trying to exhaust their administrative remedies may face increased interference by and retaliation from prison officials under the new procedure.

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[18] *See, e.g.*, 28 C.F.R. §542.14(b) (extension "may be allowed" for "a valid reason"); Ill. Admin. Code tit. 20, §504.810(a) (untimely filing excused for "good cause").

[19] *See supra* at 9-10; *compare, e.g., Dole*, 438 F.3d at 809 (prisons' refusal to hear grievances can render claims "indefinitely unexhausted"); *Ford*, 362 F.3d at 400-01 ("If it is too late to pursue administrative remedies, then exhaustion will prove impossible and §1997e(a) will permanently block litigation.").

Prison officials or staff often cause prisoners' initial failure to exhaust.[20] Courts previously refused to "reward" prison officials' interference with the grievance system, *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004), and allowed prisoners to proceed on their claims where administrative remedies were thus rendered "unavailable."[21] The Seventh Circuit's invented procedure, however, effectively excuses prisons for interfering with exhaustion in the first instance and requires prisoners to attempt exhaustion again. By removing any detrimental consequences for interfering with the availability of administrative remedies, the Circuit removed any incentive for prison officials to ensure that grievance systems operate properly. Moreover, knowing they get (at least) one free pass for misconduct creates a perverse incentive for officials to frustrate prisoners' attempts to access the grievance system.

The new procedure also will likely subject prisoners to interference or retaliation in their second attempt to exhaust because the parties from whom

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20 *See, e.g., Kaba*, 458 F.3d at 685-86 (harming or threatening prisoners); *Hemphill v. New York*, 380 F.3d 680, 686-88 (2d Cir. 2004) (threats).

21 *See, e.g., Turner v. Burnside*, 541 F.3d 1077, 1085 (11th Cir. 2008) (official threats of retaliation may render administrative remedies "unavailable"); *Kaba*, 458 F.3d at 684 ("[W]hen prison officials prevent inmates from using the administrative process ..., the process that exists on paper becomes unavailable in reality."); *Dole*, 438 F.3d at 809 (remedy is "unavailable" if prison officials prevent prisoner from exhausting); *Hemphill*, 380 F.3d at 686-88 (threats may render remedies unavailable); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) ("[A] remedy that prison officials prevent a prisoner from 'utilizing' is not an 'available' remedy under §1997e(a) ....").

prisoners must seek their administrative remedies are frequently the staff (or their coworkers) who committed the underlying wrong.[22]

The Seventh Circuit seemed to acknowledge the risk of continued official misconduct by amending its opinion to exempt from the second exhaustion attempt prisoners who are "being given a runaround." App. 6a. But, as previously discussed, *see supra* at 11, it is unclear who determines that the prisoner is being given a "runaround" the second time, when they determine it, or even what a "runaround" is. Put simply, it is impractical and unjust to force "innocent" prisoners to re-navigate a system that already failed them.

3. Requiring A Second Attempt At Exhaustion Will Create Serious Problems With Statutes Of Limitations And Staleness Of Evidence

Previously, courts allowed claims to proceed to the merits where prisoners' failure to exhaust was "innocent" so that those prisoners did not face statute

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22 *See Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985) (noting pressures on prison hearing officers to act favorably towards fellow employees in disputes with prisoners); *Hines v. Gomez*, 108 F.3d 265, 267-68 (9th Cir. 1997) (retaliation against prisoner for use of the prison grievance system), *cert. denied*, 524 U.S. 936 (1998); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (correction officers performed a "shake down" of a prisoner's cell, confiscating documents and personal property in retaliation for use of grievance process), *cert. denied*, 535 U.S. 1095 (2002); *Trobaugh v. Hall*, 176 F.3d 1087, 1089 (8th Cir. 1999) (deputy placed prisoner in administrative segregation in retaliation for prisoner's grievances).

of limitations concerns. Now, however, after a second exhaustion attempt, prisoners may find their claims time-barred if they attempt to re-file their cases in court. Courts regularly toll the statutory period during the pendency of the grievance process.[23] The same does not necessarily apply where the statute has run during the period that prisoners pursue judicial remedies.[24]

In *Woodford*, this Court recognized that one benefit of administrative remedies is "[w]hen a grievance is filed shortly after the event" at issue, "witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." 548 U.S. at 95. That benefit is lost when a prisoner who "innocently" failed to exhaust sits on his increasingly stale claims while he awaits completion of the grievance process a second time or waits long enough to satisfy the court that a response is not forthcoming and he is being given a "runaround."[25]

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[23] *See Johnson v. Rivera*, 272 F.3d 519, 522 (7th Cir. 2001) (tolling limitations period during administrative grievance process); *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000) (same); *Harris v. Hegmann*, 198 F.3d 153, 157-59 (5th Cir. 1999) (per curiam) (same).

[24] *See Crump v. Darling*, No. 1:06-cv-20, 2007 WL 851750, at *13-14 (W.D. Mich. Mar. 21, 2007) (limitations period not tolled during pendency of suit dismissed for non-exhaustion). *But see Clifford v. Gibbs*, 298 F.3d 328, 332-33 (5th Cir. 2002) (tolling limitations period during the pendency of lawsuit dismissed for failure to exhaust).

[25] *See Ford*, 362 F.3d at 400 (prisoner who waited six months for a final decision still could not bring claim).

In *amici*'s experience, it is not unusual for exhaustion to take a year or more, even in the absence of official misconduct. Since prisoners and prison staff are frequently transferred, a protracted repeat grievance procedure will impede prisoners' ability to locate and interview witnesses. Prisoners will also face evidentiary problems as witnesses' memories fade over time and prisons discard documents, videotapes, and other evidence. These problems will severely limit prisoners' ability to prepare their (primarily *pro se*) claims and obtain timely relief.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Petitioner, the Petition should be granted.

Respectfully submitted,

Zachary T. Fardon
Matthew L. Kutcher
Catherine K. Dick
Allison V. Passman
Johanna M. Spellman
Latham & Watkins LLP
Sears Tower, Suite 5800
233 S. Wacker Drive
Chicago, IL 60606
(312) 876-7700

J. Scott Ballenger
Counsel of Record
Latham & Watkins LLP
555 11th Street NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Amici Curiae Uptown People's Law Center, Legal Aid Society of New York's Prisoners' Rights Project, D.C. Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs, Prisoners' Legal Services of New York, Prison Law Office, Texas Civil Rights Project, Florida Institutional Legal Services, Inc., Prison Legal News, Roderick MacArthur Justice Center at Northwestern University School of Law and Jerome N. Frank Legal Services Organization of the Yale Law School